TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 278.

MAYER S. BERNHEIMER AND LORIN S. BERNHEIMER, SURVIVING EXECUTORS OF THE LAST WILL AND TESTAMENT OF SIMON BERNHEIMER, DECEASED, PLAINTIFFS IN ERROR,

vs.

THEODORE R. CONVERSE, RECEIVER OF THE MINNESOTA THRESHER MANUFACTURING COMPANY.

No. 279.

MAX DREY, CHARLES D. BERNHEIMER, AND MEYER A. BERNHEIMER, EXECUTORS OF THE LAST WILL AND TESTAMENT OF ISAAC BERNHEIMER, DECEASED, PLAINTIFFS IN ERROR,

vs.

THEODORE R. CONVERSE, RECEIVER OF THE MINNESOTA THRESHER MANUFACTURING COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED APRIL 30, 1906.

(20,233, 20,234.)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 8, 1906.

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1 In the Supreme Court of the United States, October Term, 1905.

MAYER S. BERNHEIMER and LORIN S. BERNHEIMER, as Surviving Executors of the Last Will and Testament of Simon Bernheimer, Deceased, Plaintiffs in Error,

against

THEODORE R. CONVERSE, as Receiver of the Minnesota Thresher Manufacturing Company, Defendant in Error.

Writ of Error to the Circuit Court of the United States for the Southern District of New York.

To the Honorable Chief Justice of the United States:

The petitioners Mayer S. Bernheimer and Lorin S. Bernheimer as surviving executors of the last will and testament of Simon Bernheimer deceased, respectfully show that on the 14th day of March, A. D. 1906, the Circuit Court of the United States, in and for the Southern District of New York, rendered a judgment against your petitioners in a certain cause wherein Theodore R. Converse, as Receiver of the Minnesota Thresher Manufacturing Company was plaintiff, and your petitioners were defendants, for the sum of Four thousand two hundred and seventy eight and 56/100 ($4,278.56) dollars and Thirty nine and 51/100 ($39.51) dollars cost, amounting in all to the sum of Four thousand three hundred and eighteen and 7/100 ($4,318.07) dollars, and awarded execution thereon as will appear by reference to the record and proceedings in said cause:

And your petitioners claim the right to remove said judgment to the Supreme Court of the United States by writ of error under
2 the provisions of the Revised Statutes of the United States, and for citation and supersedeas.

And this they will ever pray, that said judgment be reversed, &c.

Dated, March 30, 1906.

MAYER S. BERNHEIMER,
LORIN S. BERNHEIMER,
As Surviving Executors of the Last Will and Testament of Simon Bernheimer, Deceased.
By LIEBMANN, NAUMBURG & TANZER,
Attorneys for Petitioners.

(Endorsed:) Supreme Court of the U. S., October Term, 1905. Mayer S. Bernheimer *et al*, etc., Plaintiffs in Error, against Theodore R. Converse, etc., Defendant in Error.—Petition for Writ of Error.—Liebmann Naumburg & Tanzer, Attorneys for Plaintiffs in Error, 32 Broadway, New York.—U. S. Circuit Court, Southern District New York. Filed Apr. 11, 1906, John A. Shields, Clerk.

3 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable, the Judges of the Circuit Court of the United States for the Southern District of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court before you or some of you, between Theodore R. Converse, as Receiver of the Minnesota Thresher Manufacturing Company, plaintiff and Mayer S. Bernheimer and Lorin S. Bernheimer, as surviving executors of the last will and testament of Simon Bernheimer, deceased, defendants, a manifest error hath happened to the great damage of Mayer S. Bernheimer and Lorin S. Bernheimer, as surviving executors of the last will and testament of Simon Bernheimer, deceased, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 9th day of April in the Year of our Lord,
4 one thousand nine hundred and six.

JOHN A. SHIELDS,
Clerk of the Circuit Court of the United States for the Southern District of New York.

The foregoing writ is hereby allowed.

E. H. LACOMBE,
U. S. Circuit Judge.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John A. Shields, Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages numbered from five to 171 inclusive contains a true and complete transcript of the record and proceedings had in said court in the case of Mayer S. Bernheimer and Lorin S. Bernheimer, as surviving executors of the last will and testament of Simon Bernheimer, deceased, plaintiffs in error, against Theodore R. Converse, as Receiver of the Minnesota Thresher Manufacturing Company, defendant in error, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of said Court to be hereunto affixed in the City of New York, in the Southern District of New York, in the Second Circuit, this 27th day of April, in the year of our Lord, one thousand nine hundred and six, and of the Independence of the United States the one hundred and Thirtieth.

JOHN A. SHIELDS, *Clerk*.

4½ [Endorsed:] Supreme Court of the U. S. October Term 1905. Mayer S. Bernheimer *et al.*, etc., Plaintiffs in error, *against* Theodore R. Converse, etc., Defendant in error. Writ of Error. Liebmann, Naumburg & Tanzer, Attorneys for plaintiffs in error, 32 Broadway New York. We hereby, this 10th day of April 1906, accept due personal service of this writ of error on behalf of Theodore R. Converse, defendant in error. Wilson & Wallis, attorneys for defendant in error. 1.45 pd. U. S. Circuit Court. Filed Apr. 11, 1906. Southern District New York. John A. Shields, Clerk. E. & Ac. 2458.

5 United States Circuit Court, Southern District of New York.

THEODORE R. CONVERSE, as Receiver of the Minnesota Thresher Manufacturing Company,

against

MAYER S. BERNHEIMER and LORIN S. BERNHEIMER, as Surviving Executors of the Last Will and Testament of Simon Bernheimer, Deceased.

To the above-named defendants:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiffs attorneys within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, at the Borough of Manhattan in the City of New York, this 27th day of January, in the year one thousand nine hundred and four.

[L. S.] JOHN A. SHIELDS, *Clerk*.

WILSON & WALLIS,
Plaintiffs Attorneys, Office and Post Office Address 48 *Wall St., Borough of Manhattan, New York City.*

6 United States Circuit Court, Southern District of New York.

THEODORE R. CONVERSE, as Receiver of the Minnesota Thresher Manufacturing Company, Plaintiff,

against

MAYER S. BERNHEIMER and LORIN BERNHEIMER, as Surviving Executors of the Last Will and Testament of Simon Bernheimer, Deceased, Defendants.

Affidavit of Service.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Edward O. Kannofsky, being duly sworn, says: that he is over the age of twenty-one years, and that on the 28th day of January 1904, at No. 33 White Street in the Borough of Manhattan, New York City, he served the summons in this action, a copy of which is hereto annexed, together with a copy of the complaint therein mentioned on Lorin S. Bernheimer, one of the defendants in this action by delivering copies of the same to such defendant personally and leaving the same with him. He further says that he knew the person served as aforesaid to be the person mentioned and described in said summons and complaint as one of the defendants in this action.

(Signed) EDWARD O. KANNOFSKY.

Sworn to before me this 16th day of February 1904.

(Signed) WILLIAM D. MAKEPEACE,

[SEAL.] *Notary Public, New York Co.*

7 Circuit Court of the United States for the Southern District of New York.

THEODORE R. CONVERSE, as Receiver of the Minnesota Thresher Manufacturing Company, Plaintiff,

against

MAYER S. BERNHEIMER and LORIN S. BERNHEIMER, as Surviving Executors of the Last Will and Testament of Simon Bernheimer, Deceased, Defendants.

The above named plaintiff, by Wilson & Wallis, his attorneys, complains of the above named defendants, and alleges:

1. That on or about the 26th day of November, A. D. 1884, the Minnesota Thresher Manufacturing Company was duly incorporated in said State of Minnesota, under and pursuant to the provisions of the constitution and laws of said State; that ever since said date said corporation has continued to be and now is a body corporate, organized, created and existing under and by virtue of the constitution and the laws of said State; and that said corporation is, and at all times has been, a citizen and resident of the State of Min-

nesota. On information and belief, that the said defendants are the only surviving executors of the last will and testament of Simon Bernheimer, deceased, who was in his lifetime and at the time of his death a stockholder of said the Minnesota Thresher Manufacturing Company, as hereinafter stated; that said Simon Bernheimer died leaving such last will and testament, which was duly proved and admitted to probate by the Surrogate of the County of New York, State of New York, having jurisdiction of the same, and letters testamentary were thereupon, and prior to the beginning of this action, duly issued to Jacob S. Bernheimer, who died on or about the 27th day of April, 1902, and to Mayer S. Bernheimer and Lorin S. Bernheimer, the said defendants, who duly qualified thereunder and still remain such executors; that on the 16th day of August,

8 1901, the plaintiff was and still is a citizen and resident of the State of Minnesota; that the defendants are citizens of the State of New York and residents of the City of New York, in the Southern District of New York; that the matter in controversy in this action exceeds, exclusive of interest and costs, the sum of Two thousand Dollars.

2. That the articles of incorporation of said Minnesota Thresher Manufacturing Company (hereinafter called the Thresher Company) provided that the objects for which said corporation was formed was the purchase of the capital stock, evidences of indebtedness issued by and the assets of the Northwestern Manufacturing and Car Company, a corporation existing under the laws of the State of Minnesota, or any portion of said capital stock, evidences of indebtedness or assets, and the manufacture and sale of steam engines, and all kinds of farm implements, machinery of all kinds, and the manufacture and sale of all articles, implements and machinery, of which wood and iron, or either of them, form the principal component parts, and the manufacture of materials therein used, with a principal place of business at the city of St. Paul, in the County of Ramsay, in said State of Minnesota, which afterwards, by amendment to said articles of incorporation, duly made, was changed to the city of Stillwater, in the County of Washington, in said State of Minnesota; that after its incorporation as aforesaid said Thresher Company engaged in and carried on at said St. Paul and at said Stillwater all the classes of business authorized by said articles of incorporation; that said articles of incorporation have never been in any way altered, amended or modified, except as aforesaid.

3. That the Merchants' National Bank of St. Paul, Minnesota, is and during all the times hereinafter stated has been, a banking corporation organized and existing under the laws of the United States of America, having its place of business at the city of St. Paul, in the State of Minnesota; that on the 6th day of May, A. D.

9 1901, the said Thresher Company was indebted to said Merchants' National Bank of St. Paul, Minnesota, in the sum of Two thousand nine hundred and thirty-six dollars and seven cents ($2,936.07); that prior thereto an action had been duly commenced in the District Court for Ramsay County, Minnesota, in which the said bank was the plaintiff and said Thresher Company

was the defendant, of which said cause said court, which was a court of general jurisdiction and of record, had acquired jurisdiction of both of the parties and of the subject matter thereof, and on the 6th day of May, 1901, judgment was duly entered and docketed in said court in favor of said Merchants' National Bank of St. Paul, Minnesota, said plaintiff, and against said Thresher Company, for Two thousand nine hundred and thirty six dollars and seven cents ($2936.07), which said judgment has never, either in whole or in part, been paid or satisfied. That thereafter an execution, directed to the Sheriff of said Ramsay County, was duly issued and delivered to said Sheriff, who made return thereon that, after diligent search and inquiry, he was unable to find any property of said Thresher Company in his said county, and hence returned said execution wholly unsatisfied; that a certain other execution was duly issued out of said Court upon said judgment, directed to the Sheriff of said Washington County, and that said Sheriff duly returned that, after diligent search and inquiry, he was unable to find any property of said defendant in his said county, and hence returned said execution wholly unsatisfied.

4. That at the time said judgment was entered and said execution was issued and returned as aforesaid, and for a long time prior thereto, and at all times thereafter, said Thresher Company was, and it now is, wholly insolvent and without any assets or property whatsoever, other than the liability of its stockholders as hereinafter set forth.

10 5. The after the return of said executions as aforesaid, and on or about the 16th day of August, 1901, said Merchants' National Bank, as a judgment creditor of said Thresher Company, duly instituted and commenced in the District Court for the said County of Washington and State of Minnesota, which said court was then and there a court of record and of general jurisdiction, an action against said Thresher Company under and pursuant to the provisions of Chapter 76 of the General Statutes of the State of Minnesota, and the acts amendatory thereof and supplementary thereto, for the sequestration of the stock, property, things in action and effects of the said Thresher Company, and for the appointment of a receiver for the same; that said Thresher Company was duly and personally served with summons and process in said action, and on or about the 16th day of August, 1901, duly appeared in said action by its duly authorized attorney.

6. That on the said 16th day of August, 1901, judgment was duly given, rendered and entered in and by said court in said action, adjudging that the stock, property, things in action and effects of said Thresher Company be sequestered, and that a receiver therefor be appointed; that such judgment has never been appealed from nor in any manner modified, reversed, or set aside.

7. That on the 16th day of August, 1901, such proceedings were duly had that this plaintiff, Theodore R. Converse, was by said District Court for Washington County, Minnesota, in said cause, duly appointed receiver of all the property, assets, rights and interests of said Thresher Company of every sort or nature, either in law or in

equity, and with full authority and direction to sue for, collect, recover, compromise or settle any and all stockholders' liability that may exist under the constitution and laws of the State of Minnesota, or otherwise, and to prosecute and sue for the amount of such liability, or any assessment that might be made by said court
11 on account thereof for the satisfaction of the claims of the creditors of said Thresher Company, and all expenses of administration of said trust, including fees, allowances, expenses of said receiver and his counsel, and with full power and authority to sue for and enforce the collection of any assessment or stockholders' liability, either in the courts of the State of Minnesota or the courts of any other State or Territory, or the courts of the United States sitting in any State or Territory of the United States, and with full power and authority to prosecute appeals or sue out writs of error in any such suits or cases that may be so instituted by said receiver for the collection of such assessments or stockholders' liability, and in general to do and perform all acts that in the opinion of said receiver, or that he might be advised, were needful or proper for the enforcement and collection of such assessments and stockholders' liability in any of the courts of the United States, or the various States and Territories of the United States; and said receiver was further directed to seize and take into his possession, sue for and recover any and all property of every sort and nature possessed by said corporation.

8. That the plaintiff duly gave the bond required of him as such receiver, by said order, which bond was duly approved by one of the judges of said court and duly filed in said action; and that the plaintiff duly qualified as such receiver and entered upon the performance of his duties as such receiver, and ever since has acted, and now is acting, as such.

9. That thereafter, according to and in pursuance of the laws of the State of Minnesota, such proceedings were had in said last mentioned action, that an order of said District Court of said Washington County was made and entered therein on the 3rd day of
12 September, 1901, authorizing and requiring the creditors of said Thresher Company to become parties to said action, and to appear and exhibit therein their claims against said Thresher Company in the manner prescribed, and within the time specified in said order, to wit, on or before six months from and after the first publication thereof. That immediately after the entry of said order, the said order was duly published as required therein, and that within the time therein limited, and in the manner therein prescribed, certain creditors of said Thresher Company duly became parties to said action as intervenors therein, and duly exhibited therein their claims and demands against said Thresher Company, and proved the same, and after hearing duly had in said action, said claims of such creditors were duly allowed to the amount of Four hundred and forty three thousand seven hundred and fifty two dollars and seventeen cents ($443,752.17), which is the entire amount of the indebtedness of said corporation, so far as this plaintiff has been informed and as he verily believes.

10. That at the time of the organization and incorporation of said Thresher Company, and at all times thereafter, during its corporate existence, and at the time when, and at all times since, the said Simon Bernheimer, said defendants' said testator, became a stockholder in said Thresher Company, as hereinafter alleged, it was provided in and by the constitution and general laws of the State of Minnesota, pursuant to which said corporation was organized and incorporated, that each and every stockholder of said corporation severally agreed to assume and did assume liability for the indebtedness of said corporation in case of deficiency or insufficiency of corportate assets to liquidate such indebtedness, to the amount of the par value of his stock; and further agreed, in case of such deficiency, to pay and contribute for the equal benefit of the creditors of such corporation such amount, not exceeding the par value of the
13 stock held by such stockholder, as might be required to make up such deficiency. That under said constitution and general laws, and the decisions of the Supreme Court of the State of Minnesota construing and interpreting the same, said agreement and undertaking on the part of the stockholders is contractual and transitory, and runs to and is enforceable for the corporate creditors by the receiver of the corporation, and that the same is enforceable by such receiver in any jurisdiction whereof jurisdiction of stockholders may be obtained; and that said contract and agreement, on the part of the stockholders, grows out of and follows the subscription to or acquisition of the corporate stock wherein and whereby each stockholder guarantees the payment of all corporation indebtedness contracted, created or existing while such stock is held by him, and to the amount of his stock as aforesaid. And the said defendants' said testator, said Simon Bernheimer, when he accepted the stock of said corporation now owned and held by the defendants as hereinafter set forth, accepted the said provisions of the laws of Minnesota in relation thereto, and agreed to assume and pay the indebtedness of said corporation to the extent of the par value of the stock owned or held by him therein, or so much thereof as might be necessary for the payment of such indebtedness. And under the laws of Minnesota, the liability of said Simon Bernheimer, said defendants' said testator, upon his agreement aforesaid was and is an asset of said corporation.

11. That on the 16th day of August, 1901, and for a long time prior thereto, and while the provisions of the constitution and laws of the State of Minnesota as aforesaid remained in full force and effect, the above-named Simon Bernheimer, said defendants' said testator, was the lawful owner and holder, and had duly and lawfully acquired, subject to the liability and agreement aforesaid,
14 Two hundred (200) shares of the capital stock of said Thresher Company of the aggregate par value of $10,000, and that the said shares of stock were duly and lawfully issued to, and received and accepted by said Simon Bernheimer, said defendants' said testator; that said Simon Bernheimer, said defendants' said testator has never parted with or transferred any portion of said stock, but has at all times since the issue thereof to him as

aforesaid, continued to be and now is the owner and holder of the same, and of all thereof, subject only to the devolution of his title therein and his liability thereon upon said defendants as the executors of his last will and testament, and so appears by the books and records of said Thresher Company. And that said defendants, as such executors, are now vested with the title of said shares of stock, and as the personal representatives of said testator and of his estate are subject to, and hold the estate of said testator, subject to the liability and agreement aforesaid.

12. That at the time said Simon Bernheimer, said defendants' said testator, so became the owner and holder of said shares of the capital stock of said Thresher Company, the provisions of the constitution and laws of the State of Minnesota hereinbefore set forth, were in full force and effect, and became a part of said Simon Bernheimer's, said defendants' said testator, contract of purchase and ownership of said shares of stock; and said Simon Bernheimer, said defendants' said testator, in and by the purchase and ownership and holding of said shares of said stock of said Thresher Company as aforesaid, duly contracted and agreed for a valuable consideration that he would be and remain responsible with the other stockholders of said company for all contracts, debts and engagements of said company while he remained such stockholder, to the amount of his stock therein, at the par value thereof, to wit, to the amount of $10,000.

13. That it is provided by the laws of the State of Minnesota, as follows:

15 *General Laws of Minnesota for* 1899.

CHAPTER 272.

An Act to Provide for the Better Enforcement of the Liability of Stockholders of Corporations.

SECTION 1. Whenever any corporation created or existing by or under the laws of the State of Minnesota, whose stockholders or any of them, are liable to it or to its creditors, or for the benefit of its creditors, upon or on account of any liability for or upon or growing out of, or in respect to the stock or shares at any time held or owned by such stockholders, respectively, whether under or by virtue of the constitution and laws of said State of Minnesota, or any statute of said State, or otherwise, has heretofore made or shall hereafter make an assignment for the benefit of its creditors under the insolvency laws of this State; or whenever a receiver for any such corporation has heretofore been or shall hereafter be appointed by any District Court of this State, whether under or pursuant to any of the provisions of Chapter seventy-six (76) of the General Statutes of eighteen hundred and ninety-four (1894) of Minnesota, and the acts amendatory thereof, or under or pursuant to any other statute of this State, or under the general equity powers and practice of such court; the District Court appointing such receiver, or having juris-

diction of the matter of said assignment, may proceed as in this act provided.

SECT. 2. Upon the petition of the assignee or receiver of any such corporation, or of any creditor of such corporation who has filed his claim in such assignment or receivership proceedings, the said District Court shall, by order, appoint a time for hearing not less than thirty (30) nor more than sixty (60) days from the time of filing said petition with the Clerk of said Court, and shall direct such notice of such hearing to be given by the parties presenting said petition, by publication or otherwise, as the Court, in its discretion, may deem proper; but if said petition be filed by a creditor,
16 other than the assignee or receiver of said corporation, the Court shall direct that notice of such hearing be personally served on such assignees or receiver.

SECT. 3. At such hearing the Court shall consider such proofs, by affidavit or otherwise, as may then be offered by the assignee or receiver, or by any creditor or officer or stockholder of said corporation who may appear in person or by attorney, as to the probable indebtedness of said corporation, and the expenses of said assignment or receiver-hip, and the probable amount of assets available for the payment of such indebtedness and expenses; and also as to what parties are or may be liable as stockholders of said corporation, and the nature and extent of such liability. And if it appear to the satisfaction of the Court that the ordinary assets of said corporation, or such amount as may be realized therefrom within a reasonable time, will probably be insufficient to pay and discharge in full and without delay, its indebtedness, and the expenses of such assignment or receiver-hip, and that it is necessary or proper that resort be had to such liability of its stockholders, the said Court shall thereupon, by order, direct and levy a ratable assessment upon all parties liable as stockholders, or upon or on account of any stock or shares of said corporation, for such amount, proportion or percentage of the liability upon or on account of each share of said stock as the Court, in its discretion, may deem proper (taking into account the probable solvency or insolvency of stockholders, and the probable expenses of collecting the assessment); and shall direct the payment of the amount so assessed against each share of said stock to the assignee or receiver within such time thereafter as said court may specify in said order.

SECT. 4. Said order shall direct the assignee or receiver to proceed to collect the amount so assessed against each share of said stock from the parties liable therefor; and shall direct and author-
17 ize said assignee or receiver, in case of the failure of any party liable upon or on account of any share or shares of said stock to so pay the amount so assessed against the same within the time specified in said order, to prosecute actions against each and every such party so failing to pay the same, wherever such party may be found, whether in this State or elsewhere.

SECT. 5. Said order and the assessment thereby levied shall be conclusive upon and against all parties liable upon or on account of any stock or shares of said corporation, whether appearing or repre-

sented at said hearing or having notice thereof or not, as to all matters relating to the amount of and the propriety of and necessity for the said assessment. This provision shall also apply to any subsequent assessment levied by said court as hereinafter provided.

SECT. 6. It shall be the duty of such assignee or receiver to, and he may, immediately after the expiration of the time specified in said order for the payment of the amount so assessed by the parties liable therefor, institute and maintain an action or actions against any and every party liable upon or on account of any share or shares of such stock who has failed to pay the amount so assessed against the same, for the amount for which such party is so liable. Said actions may be maintained against each stockholder, severally, in this State or in any other State or country where such stockholder, or any property subject to attachment, garnishment or other process in an action against such stockholder, may be found. But if said assignee or receiver shall in good faith believe any stockholder so liable to be insolvent, or that the expense of prosecuting such action against such stockholder will be so great that it will be of disadvantage to the estate and the interest of creditors to prosecute the same, said assignee or receiver shall so report to said court;
18 and shall not be required to institute or prosecute any such action unless specifically directed so to do by said court. And in such case said court shall not require said receiver to institute or maintain such action unless said court shall have reasonable cause to believe that the result of such action will be of advantage to the estate and creditors of said corporation; except as hereinafter provided.

14. That this plaintiff, by virtue of the laws of the State of Minnesota, and his appointment as such receiver, became and was and is the representative of all the stockholders and creditors of said insolvent corporation, is invested with the title to all the rights of action possessed by said corporation, including the aforesaid liability of its stockholders, and is authorized to maintain such actions as are necessary to recover the assets thereof, included among which is the liability of said Simon Bernheimer, and of said defendants as such executors of his last will and testament, hereinbefore set forth.

15. That on the 16th day of April, 1902, the plaintiff, as such receiver, duly made and caused to be filed with and presented to said District Court of said Washington County, according to law, a petition by the plaintiff as such receiver, praying, among other things, that said Court might, by order of judgment in said action, direct and levy a ratable assessment upon the parties liable as stockholders of said Thresher Company, for such amount, proportion, or percentage of the liability for debt on account of each share of said stock, as said Court should deem proper after hearing, as by law provided, pursuant to the provisions of Chapter 272 of the General Laws of Minnesota for the year 1899 (An Act entitled "An Act to provide for the better enforcement of the liability of stockholders of corporations"), as hereinbefore set forth, and praying that said Court by order appoint a time for hearing such petition and application, and

direct such notice thereof to be given as said Court should deem proper.

19 16. That on said 16th day of April, 1902, said Court duly made and entered its order in said last mentioned action in pursuance to the provisions of said Chapter 272 of the Laws of 1899; that notice of said order was duly given in the manner prescribed by said order, notice of said order being duly published and served or mailed as therein directed; and that a copy of said order was duly mailed to the defendant herein more than twenty days prior to the date of hearing specified therein. That said matter, having been duly adjourned from time to time, and having duly come on for final hearing on the 10th day of December, 1902, at which time evidence was introduced by the receiver and by certain objecting stockholders in said Thresher Company, and the said matter having been orally argued to said Court by counsel on behalf of said stockholders and by counsel on behalf of this plaintiff, thereafter, and on the 22nd day of December, 1902, said Court duly made and entered its order or decree in said action, a true copy of which said order or decree is hereto annexed, marked "Exhibit A," and hereby referred to and made a part hereof as fully as if set up at length herein; that said last mentioned order or decree has never been in any manner reversed, modified or set aside.

17. That said Court, in and by said order or decree, adjudged that an assessment of thirty-six (36) per cent. of the par value of each share of the capital stock of said Thresher Company, to wit, the sum of Eighteen dollars ($18.00) on each share thereof be and the same was thereby assessed upon and against each and every share of said capital stock, and upon and against the person, corporation or party liable as a stockholder of said Thresher Company for, upon or on account of said shares of stock, and that each and every person, corporation or party liable as such stockholder of

20 said Thresher Company pay, and was thereby directed to pay to this plaintiff, as receiver of said Thresher Company, at his office in the city of Stillwater, County of Washington and said State of Minnesota, within thirty days after the date of said order, the said sum of Eighteen dollars (18.00) for and on account of each and every share of said stock for or upon which said person, corporation or party was liable as a stockholder of said Thresher Company as aforesaid, and that in and by said order or decree this plaintiff, as such receiver, was ordered to give due notice of such order or decree by mailing a copy of the same within ten days from the date thereof to each stockholder and to the personal representatives of each stockholder of said Thresher Company whose name and address was known to said receiver. That the amount so aforesaid adjudged and assessed against the stockholders of said corporation, was a just and proper amount for the payment of its indebtedness and the other charges which, by the laws of Minnesota, this plaintiff was required to pay, and was and is necessary for that purpose.

18. That notice of said last mentioned order of said District Court of said Washington County was duly given by this plaintiff as such

receiver, as prescribed by said order, and in the manner directed thereby.

19. That certain stockholders of said Thresher Company who duly intervened in said last mentioned action, and objected to the issuance of said last mentioned order or decree and the levy of any assessment, duly prosecuted an appeal from said last mentioned order or decree to the Supreme Court of said State of Minnesota; that said appeal was duly heard and considered by said Supreme Court; and that at the April Term, A. D. 1903, of said Court, judgment was rendered and entered in said matter in and by said Supreme Court, determining and adjudging that the said order or decree so appealed from be in all things affirmed.

21 20. That the plaintiff gave notice of the decision and judgment of said Supreme Court in the matter of said order or decree by mailing a copy of said order and of the opinion of said Supreme Court to each stockholder of said Thresher Company whose name and address was known to the plaintiff.

21. That in and by the authority of said last mentioned order or decree and of the constitution and laws of the State of Minnesota and of the United States, there is due and owing from defendants to the plaintiff, as such receiver, the sum of Three thousand six hundred Dollars, and interest thereon at the rate provided by the laws of the said State of Minnesota, to wit, at the rate of six (6%) per cent. per annum from the 21st day of January, 1903; that more than thirty days have elapsed since the date of said order, and that the plaintiff, as such receiver, has duly demanded of the defendants payment of the amount due from said Simon Bernheimer, as such stockholder of said Thresher Company, under and pursuant to said order; that the defendants have failed and refused to pay the same or any part thereof, and that no part thereof has been paid.

Wherefore the plaintiff, as such receiver, demands judgment against the defendants, as such executors of the last will and testament of said Simon Bernheimer, for the sum of Three thousand six hundred Dollars, and interest thereon at the rate of six (6%) per cent. per annum, from the 21st day of January, 1903, and for the costs and disbursements of this action.

WILSON & WALLIS,
Plaintiff's Attorneys.

Office and Post Office Address, 48 Wall Street, New York, Borough of Manhattan.

22 STATE OF MINNESOTA, *County of Ramsey, ss:*

Theodore R. Converse, being duly sworn, deposes and says that he is the plaintiff in the above entitled action; that the foregoing complaint is true to his own knowledge, except as to matters therein stated to be alleged upon information and belief; and as to those matters he believes it to be true.

THEODORE R. CONVERSE.

Sworn to before me this 2nd day of Jan'y, 1904.

[SEAL.] C. W. G. WITHEE,
Notary Public, Ramsey Co., Minn.

STATE OF MINNESOTA, *County of Ramsey, ss:*

I, Edward G. Rogers, Clerk of the District Court in and for the County of Ramsey, in the State of Minnesota, the same being a Court of Record of the aforesaid County, having by law a seal, do hereby certify that C. W. G. Withee by whom the foregoing affidavit was taken, and whose name is subscribed thereto, was at the time of taking the same a notary public residing in said County, duly commissioned and sworn and authorized by the laws of said State to take the proof or acknowledgment of deeds or conveyances of lands, tenements and hereditaments in said State, and other instruments in writing to be recorded in said State, and to administer oaths or affirmations in said County, and that I am well acquainted with his handwriting and verily believe that the signature to the foregoing certificate is genuine.

In witness whereof, I have hereunto set my hand and affixed my official seal, which is the seal of said Court, this 2nd day of January, 1904.

[SEAL.] EDWARD G. ROGERS, *Clerk.*

23 "EXHIBIT A."

STATE OF MINNESOTA, *County of Washington:*

District Court, First Judicial District.

MERCHANTS' NATIONAL BANK OF ST. PAUL, MINN. (a Corporation),
Plaintiff,
v.
MINNESOTA THRESHER MANUFACTURING COMPANY (a Corporation),
Defendant.

Order.

This matter having come on to be heard at a special term of this court held at the Court House in the city of Stillwater, in said county and State, on Tuesday the 10th day of June, 1902, at ten o'clock in the forenoon, pursuant to an order made and entered herein on the 16th day of April, 1902, upon the petition of Theodore R. Converse, Receiver of said defendant corporation, which petition was duly filed with the Clerk of this court, praying among other things that this court might, by order herein, direct and levy a ratable assessment upon the parties liable as stockholders of said defendant corporation, for such amount, proportion or percentage of the liability, for or on account of each share of said stock, as the court should deem proper after hearing as by law provided, pursuant to the provisions of Chapter 272 of the General Laws of Minnesota

for the year 1899; and said Receiver having duly appeared at said special term of court on the said 10th day of June, 1902, in support of the said petition of said Receiver, by Messrs. Davis, Kellogg & Severance, his attorneys; and Messrs. Koon, Wheelan and Bennett, Charles P. Searle, and J. H. Benton, Jr., having appeared in opposition thereto on behalf of the following named stockholders of said defendant, to wit:

D. N. Morgan, of Bridgeport, Conn.; George E. Carter, of Boston, Mass.; Dime Savings Bank, of Norwich, Conn.; Bingham National Bank, of Bingham, Mass.; Mechanics National Bank of
24 Worcester, Mass.; Great Falls National Bank of Great Falls, N. H.; Naumkeag National Bank, of Salem, Mass.; Home National Bank of Brockton, Mass.; and Second National Bank of Bangor, Maine; and said counsel for objecting stockholders having filed a written objection and answer to the said petition, to which a reply was duly filed by the counsel for said Receiver; and it appearing to the satisfaction of the court that copies of said order dated April 16th, 1902, were duly published, mailed and served in the manner therein prescribed, and that due notice of said hearing was duly given by said Receiver to the defendant and to each stockholder of record of the defendant, as directed by said order; and the said matter having been adjourned from time to time, and having duly come on for final hearing on Wednesday, the 10th day of December, 1902, at which time evidence was introduced by the Receiver and by said objecting stockholders, and the said matter having been orally argued to the court by M. B. Koon, Esq., one of the counsel for said objecting stockholders, on behalf of said stockholders, and by C. A. Severance, Esq., one of the attorneys for said Receiver on behalf of said Receiver; and it appearing to the satisfaction of the court, after hearing and considering the proofs and evidence introduced at said hearing by and in behalf of said parties respectively, and the arguments of counsel, that it is necessary and proper that an assessment of Eighteen dollars ($18.00) on each share of capital stock of said corporation be directed and levied herein against all parties liable as stockholders of said defendant.

Now therefore, it is ordered: That an assessment of thirty six per cent. (36%) of the par value of each share of the capital stock of said defendant, to wit: the sum of eighteen dollars ($18.00) on each share thereof, be, and the same is hereby assessed upon and against each and every share of said capital stock, and upon
25 and against the person, corporation or party liable as a stockholder of defendant for, upon or on account of such shares of stock, and that each and every person, corporation or party liable as such stockholder of said defendant be, and he is hereby directed to pay to Theodore R. Converse, Receiver of said defendant, at his office in the city of Stillwater, County of Washington and said State of Minnesota, within thirty (30) days after the date of this order, the said sum of Eighteen dollars ($18.00) for and on account of each and every share of said stock for or upon which said person, cor-

poration or party is liable as a stockholder of said defendant as aforesaid.

Ordered further: That said Receiver forthwith proceed to collect the several amounts due from the several persons, corporations and parties liable as stockholders of said defendant under the terms of this order, and hold the amount thus collected subject to the further order of this court herein.

Ordered further: That in case any person, corporation or party liable as a stockholder of said defendant shall fail to pay the amount hereby assessed against the share or shares of stock held or owned by such stockholder, or upon or on account of which he or it may be liable, within the time hereinbefore specified, said Receiver is hereby directed and authorized to forthwith institute and prosecute such action or actions or other proceedings against such person, persons, corporation or party liable in any court having jurisdiction, whether in this State or elsewhere, which said Receiver may deem necessary or proper for the recovery of the amount due from such person, persons, corporation or party under the terms of this order.

Ordered further: That said Receiver give due notice of this order by mailing a copy of the same within ten days from the date hereof, to each stockholder of said defendant whose name and address is known to said Receiver.

By the Court—

W. C. WILLISTON,
District Judge.

Dated December 22d, 1902.

26 570.—*Notice of Appearance.*

United States Circuit Court, Southern District of New York.

THEODORE R. CONVERSE, as Receiver of the Minnesota Thresher Manufacturing Company,

against

MAYER S. BERNHEIMER and LORIN S. BERNHEIMER, as Surviving Executors of the Last Will and Testament of Simon Bernheimer, Deceased.

Notice of Appearance.

SIR: Please to take Notice, That the defendants Mayer S. Bernheimer and Lorin S. Bernheimer, as surviving executors of the last will and testament of Simon Bernheimer, deceased, appear in this action, and that we are retained as Attorneys for them therein, and demand that a copy of all papers in this action be served on us at our office, number 25 Broad Street, Borough of Manhattan, New York City.

New York, Feb. 9, 1904.

Yours, &c.,

JACOB & TANZER,
Attorneys for Defendants.

Office and Post Office Address: 25 Broad St., Manhattan, New York City.

To Wilson & Wallis, Esqs., Plaintiffs Attorneys, 48 Wall St., Manhattan, New York City.

[Endorsed:] United States Circuit Court, Southern District of New York. Theodore R. Converse, as Receiver, &c., *against* Mayer S. Bernheimer & ano., as surviving Executors, &c. Orig. Notice of Appearance. Jacob & Tanzer, Attorneys for Defendants. Due service of a notice, of which the within is a copy, admitted this 9th day of February 1904. Wilson & Willis, Plaintiffs' Attorneys.

27 Circuit Court of the United States for the Southern District of New York.

THEODORE R. CONVERSE, as Receiver of the Minnesota Thresher Manufacturing Company, Plaintiff,

against

MAYER S. BERNHEIMER and LORIN S. BERNHEIMER as Surviving Executors of the Last Will and Testament of Simon Bernheimer, Deceased, Defendants.

The defendants above named for their amended answer to the complaint in this action allege as follows:

I. These defendants admit that they are the only surviving executors of the last will and testament of Simon Bernheimer; that said Simon Bernheimer died leaving his will and testament which was duly proved and admitted to probate by the Surrogate of the County of New York, State of New York, having jurisdiction of the same, that letters testamentary were thereupon and prior to the beginning of this action, duly issued to Jacob S. Bernheimer who died on or about the 27th day of April, 1902, and to these defendants, who duly qualified thereunder and still remain such executors; that the defendants are citizens of the State of New York and residents of the City of New York in the Southern District of New York; that the said Simon Bernheimer was at the time of his death the holder of two hundred shares of the Capital Stock of the Minnesota Thresher Manufacturing Company; and that no part of the sum claimed in the complaint to be due has been paid.

II. These defendants have no knowledge or information sufficient to form a belief as to the truth of any of the allegations in the said complaint contained, other than those expressly admitted
28 and therefore they deny the same.

Further answering the said complaint herein:

III. These defendants allege and claim that Chapter 272 of the General Laws of Minnesota for 1899, set forth in the complaint, and all the provisions thereof, and all proceedings thereunder, in so far as it was or is sought thereby to affect any alleged liability arising from or out of the ownership of stock acquired by the said Simon Bernheimer before the enactment of the said act, or by reason of ownership by said Simon Bernheimer of stock in any corporation organized before the enactment of said act, or by reason of debts contracted before the enactment of said act were and are in violation of the provisions of Section ten of Article one, of the Constitu-

tion of the United States, that no State shall pass any law impairing the obligation of contracts, and therefore void and of no effect.

IV. These defendants allege and claim that the said provisions of Chapter 272 of the General Laws of Minnesota for 1899, and all proceedings had thereunder, so far as it is sought thereby to charge with liability or to affect these defendants who were not parties to the said proceedings, nor heard therein, nor served with process therein, and in so far as it is sought to take the property of the defendants in the amount and for the purposes mentioned in the said complaint, were and are in violation of the provisions of Section one of Article fourteen of the Amendments to the Constitution of the United States, that no State shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction, the equal protection of the laws.

29 Further answering the said complaint and for a separate defense, these defendants allege:

V. That the said Minnesota Thresher Manufacturing Company was and is a corporation organized for the purpose of carrying on a manufacturing business exclusively, and was at all times engaged in carrying on a manufacturing business exclusively.

Further answering the said complaint and for a separate and second defense to the cause of action alleged in the complaint, the defendants allege:

VI. Upon information and belief, that the cause of action alleged in the complaint, and each of the causes of action against the Minnesota Thresher Manufacturing Company, to satisfy which the assessment on the shareholders of said Company was assumed to be levied, as set forth in the complaint, arose in the State of Minnesota and originally accrued in favor of a non-resident of the State of New York, and that each and every of said causes of action mentioned in this paragraph did not accrue within six years before the commencement of this action.

VII. And the defendants further allege on information and belief, that the plaintiff is, and was at all the times mentioned in the complaint, a non-resident of the State of New York, and that the Minnesota Thresher Manufacturing Company is, and was at all said times a foreign corporation and a non-resident of the State of New York, and that the owners of the causes of action against the Minnesota Thresher Manufacturing Company, to pay whose claims the assessment mentioned in the complaint was assumed to be levied, each are, and at all said times were, non-residents of the State of New York.

For a third and separate defense to the cause of action alleged in the complaint, the defendants allege:

30 VIII. On information and belief, that the cause of action alleged in the complaint, and each of the causes of action against the Minnesota Thresher Manufacturing Company, to satisfy which the assessment on the shareholders of the Company was assumed to be levied, as set forth in the complaint, were each founded upon a debt of the said Company not payable within two years from

the time it was contracted, and that an action against the Company was not commenced thereon within two years after the date the same became due and execution issued thereon and returned unsatisfied in whole or in part.

For a fourth and separate defense to the cause of action alleged in the complaint, the defendants allege:

IX. On information and belief, that the causes of action alleged in the complaint and each of the causes of action against the Minnesota Thresher Manufacturing Company to satisfy which the assessment on the shareholders of the Company was assumed to be levied as set forth in the complaint, did not accrue within six years before the commencement of this action, and each of said causes of action did not accrue within six years before the commencement of the action or proceeding in or by which the said assessment was so assumed to be levied.

For a fifth and a separate defense to the cause of action alleged in the complaint; the defendants, repeating and realleging the allegations of the third separate defense, allege:

X. On information and belief, that said Simon Bernheimer, deceased, and these defendants, as his executors ceased to be stockholders upon the sequestration of the stock, property, things in action and effects of said corporation and the appointment of a receiver of the same, as set forth in the complaint, to wit, on or
31 about the 16th day of August, 1901. That ever since said time the plaintiff has been the permanent receiver of the said stock, property, things in action and effects of the said corporation, and vested with the exclusive control thereof; that no officers, agents or employees of said corporation have been elected or appointed and the transfer of shares of stock thereof has not been permitted or been possible; that no business has been carried on or corporate act performed by said corporation; and that said corporation has had no assets except the liability, if any, of its shareholders. That the defendants are advised and believe that the said adjudication of sequestration and the appointment of the said receiver amounted under the law, both of the State of New York and of the State of Minnesota to a dissolution of the said corporation. That from the time when said Simon Bernheimer, deceased, or these defendants as his executors ceased to be stockholders in said Company, more than two years had elapsed before the commencement of this action.

For a sixth and separate defense to the cause of action alleged in the complaint, the defendants allege:

XI. That the said Simon Bernheimer died on or about the 26th day of April, 1900, leaving property in the State of Minnesota, and leaving a Last Will and Testament which was duly admitted to probate in the Probate Court of the County of Ramsey and State of Minnesota having jurisdiction of the same, on or about the 7th day of September, 1900, and letters testamentary were thereupon duly issued to the executors named therein who qualified. That thereafter and on the 7th day of September, 1900, an order was duly made by the said Court allowing six months from and after
32 the date of the said order, in which all persons having claims or demands against the said Simon Bernheimer were re-

quired to file the same in the said Probate Court for examination and allowance or be forever barred; and appointing the first Monday in April, 1901, at ten o'clock A. M. at a General Term of said Probate Court, to be held at the Court House in the City of St. Paul in said County, as the time and place when and where the said Probate Court would examine and adjust said claims and demands, and directing that notice of such hearing be given to all creditors and persons interested in said estate by forthwith publishing the said order once in each week for three successive weeks in the St. Paul Dispatch, a daily newspaper printed and published in said County. That the said order was published at the times and in the manner in said order directed.

XII. That no claim or demand upon the cause of action alleged in the complaint or upon any of the causes of action against the Minnesota Thresher Manufacturing Company to satisfy which, the assessment on the shareholders of said company is assumed to be levied as set forth in the complaint, nor any claim upon any liability of the said Simon Bernheimer as a stockholder of the said Minnesota Thresher Manufacturing Company was presented within the time fixed in the said order or at any time to the said Probate Court or to any Probate Court, or to these defendants or to any of them.

XIII. That the cause of action alleged in the complaint and each of the causes of action against the Minnesota Thresher Manufacturing Company to satisfy which the assessment on the shareholders of said company was assumed to be levied as set forth in the complaint arose in the State of Minnesota and originally accrued in
33 favor of a non-resident of the State of New York; that the plaintiff is and was at all the times mentioned in the complaint a non-resident of the State of New York and a resident of the State of Minnesota; and that the Minnesota Thresher Manufacturing Company is and was at all of said times a foreign corporation and a non-resident of the State of New York, and a resident of the State of Minnesota; and upon information and belief that each of the owners of the causes of action against the Minnesota Thresher Manufacturing Company to pay whose claims the assessment mentioned in the complaint was assumed to be levied are and at all of said times were non-residents of the State of New York, and residents of the State of Minnesota.

Wherefore, the defendants demand judgment dismissing the complaint with costs.

JACOB & TANZER,
Attorneys for Defendants.

Office & P. O. Address, 25 Broad Street, Borough of Manhattan, New York City.

STATE OF NEW YORK, *County of New York*, ss:

Lorin S. Bernheimer, being duly sworn, deposes and says: that he is one of the defendants in this action; that he has read the foregoing answer and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated to

be alleged on information and belief, and as to those matters he believes it to be true.

LORIN S. BERNHEIMER.

Sworn to before me this 18th day of November, 1904.

SIGMUND WICHSLER,
Notary Public No. 36, N. Y. Co.

34 At a stated Term of the Circuit Court of the United States, held in and for the Southern District of New York, at the Court Room, thereof, in the Post Office Building in the Borough of Manhattan, City, County and State of New York, on the 3rd day of November, 1905.

Present: Hon. E. Henry Lacombe, Justice.

THEODORE R. CONVERSE, as Receiver of the Minnesota Thresher Manufacturing Company, Plaintiff,

against

MAYER S. BERNHEIMER and LORIN S. BERNHEIMER, as Surviving Executors of the Last Will and Testament of Simon Bernheimer, Deceased, Defendants.

On reading and filing the annexed consent and on motion of Liebmann, Naumburg & Tanzer, Esqrs. attorneys at law, it is

Ordered that Liebmann, Naumburg & Tanzer, be, and they are hereby substituted in the place and stead of Jacob & Tanzer, as attorneys for the defendants in the above entitled action.

Enter,

E. H. LACOMBE,
J. U. S. C. C.

35 Circuit Court of the United States, for the Southern District of New York.

THEODORE R. CONVERSE, as Receiver of the Minnesota Thresher Manufacturing Company, Plaintiff,

against

MAYER S. BERNHEIMER and LORIN S. BERNHEIMER, as Surviving Executors of the Last Will and Testament of Simon Bernheimer, Deceased, Defendants.

It is hereby consented that Liebmann, Naumburg & Tanzer, Esqrs. attorneys and counsellors at law be substituted in the place and stead of the firm of Jacob & Tanzer Esqrs. as attorneys for the defendants in the above entitled action.

Dated September 27th 1905.

MAYER S. BERNHEIMER.
LORIN S. BERNHEIMER.

STATE OF NEW YORK, *County of New York, ss:*

On the 27th day of Sept. 1905 before me came and appeared Mayer S. Bernheimer & Lorin S. Bernheimer to me known and known to me to be the persons mentioned in and who executed the foregoing consent and they thereupon duly acknowledged to me that they executed the same.

NATHAN APPLEBAUM,
Commr. of Deeds, N. Y. City.

36 (Endorsed:) Circuit Court of the U. S., Southern District of N. Y.—Theodore R. Converse, as Receiver, etc., Plaintiff, against Meyer S. Bernheimer, *et al.*, as Receiver, etc., Defendants.—Order and consent of substitution.—Liebmann, Naumburg & Tanzer, Attorneys at Law, 32 Broadway, New York.—U. S. Circuit Court, Southern District New York, Filed Nov. 3, 1905, John A. Shields, Clerk.

37 At a State Term of the Circuit Court of the United States of America for the Southern District of New York in the Second Circuit, held at the United States Court Rooms in the Borough of Manhattan, in the City of New York, on Friday, the 9th day of March in the year of our Lord 1906.

Present: Honorable George C. Holt, Judge.

THEODORE R. CONVERSE, as Receiver of the Minnesota Thresher Manufacturing Company,

against

MAYER S. BERNHEIMER and LORIN BERNHEIMER, as Surviving Executors of the Last Will and Testament of Simon Bernheimer, Deceased.

Now comes the plaintiff, by William C. Wilson, Esq., his attorney, and moves the trial of this cause. Likewise come the defendants by L. A. Tanzer, Esq., their attorney. Thereupon a jury is impanelled and the cause proceeds to trial.

After hearing the evidence for the respective parties and the arguments of counsel, the jury, by direction of the court find a verdict for the plaintiff in the sum of $3,600, with interest $675., amounting in all to the sum of $4,275., subject to correction.

Thereupon the court denies a motion for a new trial, and grants defendants a stay of sixty days after entry of judgment within which to make and serve a case with leave to turn the same into a bill of exceptions.

An extract from the minutes.

(Signed)

JOHN A. SHIELDS, *Clerk.*

38 Circuit Court of the United States for the Southern District of New York.

THEODORE R. CONVERSE, as Receiver of the Minnesota Thresher Manufacturing Company, Plaintiff,

against

MAYER S. BERNHEIMER and LORIN S. BERNHEIMER, as Surviving Executors of the Last Will and Testament of Simon Bernheimer, Deceased, Defendants.

Judgment.

The issues in this action having been brought to trial before the Hon. George C. Holt, United States Judge and a jury at a Stated Term of the Circuit Court of the United States, held on the 9th day of March, 1906, in the United States Court Room, in the Post Office Building, in the Borough of Manhattan, City of New York, and the plaintiff appearing by William G. Wilson, his counsel, and the defendants appearing by Lawrence Arnold Tanzer, their counsel and the issues having been tried and a verdict for the plaintiff having been duly rendered against the defendants by direction of the court, on the said 9th day of March, 1906, for the sum of Four thousand, two hundred, seventy-five dollars ($4,275), which, with interest thereon to the date hereof, amounts to the sum of Four thousand, two hundred, seventy-eight 56/100 Dollars ($4,278.56) and the costs of said plaintiff having been duly adjusted at the sum of Thirty nine 51/100 Dollars ($39.51).

Now, on motion of Wilson & Wallis, attorneys for the plaintiff it is

Adjudged that the said plaintiff Theodore R. Converse as Receiver of the Minnesota Thresher Manufacturing Company, recover of the said defendants Mayer S. Bernheimer and Lorin S. Bernheimer, as surviving Executors of the last will and testament of Simon Bernheimer, deceased the sum of Four thousand two
39 hundred and seventy-five dollars ($4,275) found by the jury, with interest thereon as aforesaid, amounting together to the sum of Four thousand two hundred and seventy eight 56/100 dollars ($4,278.56) and with Thirty-nine 51/100 ($39.51) costs, amounting in all to the sum of Forty-three hundred eighteen 07/100 Dollars ($4318.07) and that we have execution therefor.

Judgment signed and entered this 14th day of March, 1906.

JOHN A. SHIELDS, *Clerk.*

(Endorsed:) U. S. Circuit Court, Southern District of N. Y.—Theodore R. Converse, as Receiver, &c. agst. Mayer S. Bernheimer & ano. as surviving executors &c. of Simon Bernheimer, dec'd.—Judgment.—Wilson & Wallis, Attorneys for Plaintiff, 48 Wall Street, New York.—U. S. Circuit Court, Southern District New York, Filed Mar. 14, 1906, John A. Shields, Clerk.

40 United States Circuit Court, Southern District of New York.

THEODORE R. CONVERSE, as Receiver of the Minnesota Thresher Manufacturing Company, Plaintiff,
against
MAYER S. BERNHEIMER and LORIN S. BERNHEIMER, as Surviving Executors of the Last Will and Testament of Simon Bernheimer, Deceased, Defendants.

Bill of Exceptions.

The issues in this action came on for trial at the October 1905 term of this court, and on the 9th day of March, 1906, were tried before Honorable George C. Holt, District Judge, and a jury, the parties being represented respectively by their attorneys and counsel, namely, Messrs. Wilson & Wallis, attorneys for plaintiff, and William G. Wilson, Esq., and George E. Coney, Esq., of counsel; and the defendants by Messrs. Liebmann, Naumburg & Tanzer, their attorneys, and Laurence Arnold Tanzer, Esq., of counsel.

During the course of the trial, the counsel for the defendants did take and allege sundry exceptions to the rulings of the court, and to the refusal of the court to dismiss the complaint, and to the refusal of the court to direct a verdict for the defendants, and to the denial by the court of certain motions made by the defendants, and to the direction by the court of a verdict for the plaintiff, which exceptions are hereinafter specifically set forth.

41 The following are the proceedings had and all the evidence given upon the trial of this action.

A jury was impanelled and sworn.

Counsel for the defendants moved to dismiss the complaint and for judgment for the defendants on the pleadings on the following grounds:

1. That the complaint does not state facts sufficient to constitute a cause of action in favor of the plaintiff against the defendants.

2. That Chapter 272 of the General Laws of Minnesota of 1899 under the alleged authority of which the assessment here sued upon is claimed to have been levied, contravenes the provisions of Section 10 of Article I of the Constitution of the United States, in that it impairs the obligation of the contracts of the stockholders of the Minnesota Thresher Manufacturing Company, and of the creditors of the said corporation, and particularly of the defendants' testator and of these defendants as his executors.

3. That these defendants were not parties to the proceeding in which the said assessment was assumed to be levied and are not bound thereby.

4. That the said Chapter 272 of the General Laws of Minnesota of 1899, and all proceedings had thereunder, so far as it is sought thereby to charge with liability or to affect these defendants, or to take their property in the amounts and for the purposes men-

42 tioned in the complaint, contravene the provisions of Section 1 of Article XIV of the Amendments to the Constitution of

the United States, in that they deprive the stockholders of said corporation, who were not parties to the said proceedings, nor heard therein, nor served with process therein, and particularly these defendants, of property without due process of law, and deny to them the equal protection of the laws.

5. That the District Court of Washington County, Minnesota, had no jurisdiction to entertain the said proceedings or to appoint a receiver, or to levy an assessment therein, because the proceeding in said court was not a proceeding of the nature contemplated by, or instituted in the manner directed in, said Act of 1899, or Chapter 76 of the General Statutes of Minnesota.

6. That the plaintiff has no such title or interest as gives him a standing to maintain this action in a court of a jurisdiction other than that in which he was appointed.

7. That the said Minnesota Thresher Manufacturing Company was a corporation organized for the purpose of carrying on a manufacturing business, and its stockholders are exempt from liability under the provisions of Section 3 of Article X of the Constitution of the State of Minnesota.

8. That this action was not brought within two years after these defendants or their testator ceased to be stockholders in said corporation, within the meaning of Section 55 of the Stock Corporation Law of the State of New York.

43 Decision reserved until plaintiff rests.

Mr. Wilson opened the case for the plaintiff.

Counsel for plaintiff reads in evidence stipulation as to facts, and asks that it be marked in evidence.

Marked Plaintiff's Exhibit A, and is as follows:

44 "U. S. Circuit Court, Southern District of New York.

THEODORE R. CONVERSE, as Receiver of the Minnesota Thresher Manufacturing Company,

against

MAYER S. BERNHEIMER and LORIN S. BERNHEIMER, as Surviving Executors of the Last Will and Testament of Simon Bernheimer, Deceased.

THEODORE R. CONVERSE, as Receiver of the Minnesota Thresher Manufacturing Company,

against

MAX DREY, CHARLES D. BERNHEIMER, and MEYER A. BERNHEIMER, as Executors of the Last Will and Testament of Isaac Bernheimer, Deceased.

Stipulation as to Facts.

It is hereby stipulated and agreed that the following facts are admitted by plaintiff and defendants in the two above entitled actions, and that upon the trial of said actions this stipulation shall be received in place and stead of other proof of such facts, without

prejudice to any objections to be taken upon the trial upon any other ground than that of the form and mode of proof of the facts herein contained:

Said plaintiff is a resident and citizen of the State of Min-
45 nesota.

The Northwestern Manufacturing & Car Company was incorporated under the laws of Minnesota by certificate filed May 12, 1882. The purpose of its incorporation as expressed in said certificate was that "of manufacturing, building, and selling passenger cars, freight cars, cattle cars, flat cars, and all other kinds of cars, and the fixtures and attachments thereto belonging, and the manufacture and sale of farm implements and machinery of all kinds, and the manufacture and sale of all articles, implements, and machinery, of which wood and iron form the principal component parts."

The Minnesota Thresher Manufacturing Company was incorporated under the laws of the State of Minnesota by certificate filed December 5, 1884. The articles embodied in this certificate were never changed in any respect excepting by an amendment changing the place of business specified therein from St. Paul, Ramsey County, Minnesota, to Stillwater, Washington County, Minnesota. The particulars and details of this certificate of incorporation may be proved by either party by the introduction in evidence of a true copy thereof.

The Minnesota Thresher Manufacturing Company, in the interval between the date of its incorporation in 1884 and the month of January, 1888, was engaged in the exchange of certain portions of its capital stock for claims against said Northwestern Manufacturing
& Car Company, with the holders of these claims, and for
46 certain shares of the capital stock of said Northwestern Manufacturing & Car Company with the holders of such stock, and during the same period was engaged in no other business. And during the same period, the business of said Northwestern Manufacturing & Car Company and the management of the property of that company were carried on by a receiver of that company, who had been appointed by the District Court of the State of Minnesota.

The property, assets, and business of said Northwestern Manufacturing & Car Company were sold by the receiver of that company under order of the District Court of Minnesota for Washington County, and on such sale, was purchased by said Minnesota Thresher Manufacturing Company; and the last named company obtained actual possession of the same and began active business therewith on January 5, 1888.

On May 6, 1901, the Merchants' National Bank of St. Paul, a national banking association organized under the laws of the United States, obtained a judgment in the District Court of Minnesota for the County of Ramsey against said Minnesota Thresher Manufacturing Company for the sum of $2,938.07; and executions upon such judgment were issued to the Counties of Ramsey and Washington and returned wholly unsatisfied. Further details and particulars of this judgment and executions may be proved by either party by

he introduction in evidence of a true copy of the same. Thereupon
uit was brought in the District Court of Minnesota for Washington
County by said Merchants' National Bank of St. Paul against
7 said Minnesota Thresher Manufacturing Company, seeking
the appointment of a receiver of the defendant and the en-
orcement of the individual liability of the defendant's stockholders.
n said suit, the plaintiff, Theodore R. Converse was, on August 16,
1901, appointed such receiver, and qualified as such and entered
on the duties of such receivership, and still continues in such office.
And such further proceedings were had therein that on December
23, 1902, said court made an order or decree assessing the sum of
$18.00 per share on each share of the capital stock of the defendant
and against the person, corporation or party liable as a stockholder
therefor, and directing said receiver, in case of the non-payment of
the same within a time thereby fixed, to bring and maintain actions
against the persons, corporations, or parties so liable in any juris-
diction within the United States. Further details and particulars
of said proceedings may be proved by either party by the intro-
duction in evidence of true copies of the record thereof.

Said plaintiff, Theodore R. Converse, complied with the require-
ments of the orders and decree of said District Court of Minnesota
for Washington County, by mailing the notices therein directed to
be so served to all the stockholders of record of said Minnesota
Thresher Manufacturing Company whose addresses were known to
him.

Said plaintiff, Theodore R. Converse, as such receiver of said
Minnesota Thresher Manufacturing Company, did not come into
possession of any property or assets of that company other
48 than the books and records of the company, and such right as
was vested in him by law and by the orders and decree of the
District Court of Minnesota to enforce the individual liability of
stockholders of that company and to collect the assessment aforesaid.

An appeal from said order or decree of the District Court of
Washington County, Minnesota, making the assessment aforesaid,
was taken to the Supreme Court; and thereafter, and after hearing,
said Supreme Court gave its decision and judgment affirming said
order or decree of said District court; and the decision of said Su-
preme Court thereupon is reported under the title of Merchants'
National Bank against Minnesota Thresher Manufacturing Com-
pany, in Volume 90 of Minnesota Reports, page 144. Said plaintiff
gave notice of this decision by mailing a copy of the same to each
stockholder of said Minnesota Thresher Manufacturing Company
whose name and address were known to him.

(Signed) WILSON & WALLIS,
Plaintiff's Attorneys.
JACOB & TANZER,
Defendants' Att'ys.

49 Plaintiff's counsel offers in evidence the Articles of Asso-
ciation of the Minnesota Thresher Manufacturing Company.
Marked Plaintiff's Exhibit B, and is set forth in full in paragraph
"Third" of Defendants' Exhibit 1, hereinbelow contained.

Also order of the District Court of the State of Minnesota for the County of Washington, in the suit of the Merchants' National Bank of St. Paul Minnesota, plaintiff *vs.* the Minnesota Thresher Manufacturing Company, defendant, dated December 22nd, 1902.

Marked Plaintiff's Exhibit C and is set forth in full in paragraph "Eighteenth" of Defendant's Exhibit 1, which is herein below set forth.

Plaintiff rests, subject to computation of interest.

Defendants' counsel renews motion to dismiss the complaint and for judgment for the defendants on the grounds heretofore stated, and on the additional ground that no cause of action has been pleaded or proved.

The COURT: "I will pass upon that when you put your evidence in."

Defendants' counsel reads in evidence stipulation as to facts, so far as the same has not already been read in evidence.

Marked Defendants' Exhibit 1, and is as follows:

50 U. S. Circuit Court, Southern District of New York.

THEODORE R. CONVERSE, as Receiver of the Minnesota Thresher Manufacturing Company, Plaintiff,

against

MAYER S. BERNHEIMER and LORIN S. BERNHEIMER, as Surviving Executors of the Last Will and Testament of Simon Bernheimer, Deceased, Defendants.

Agreed Facts.

The following facts are agreed for the purposes of this case only, and saving to the parties to this agreement, and each of them, any and all objection to the competency or materiality of said facts, or any of them, and reserving to the parties and each of them the right to prove any other material fact.

First. In September, 1874, a corporation was organized under the laws of Minnesota by the name of Seymour, Sabin & Co., for the purpose of carrying on the business of general manufacturing, merchandising, and lumber. The corporation acquired and possessed at Stillwater, Washington Co., Minnesota, an extensive manufacturing establishment and plant, consisting of real estate, buildings, machinery, and appliances necessary therefor, and manufactured and sold principally threshing machines and other farm and agricultural machinery and implements, which it sold largely upon credit, taking in many cases in payment mortgages, farmers' notes, or other liens on the property sold. This business of the
51 manufacture and sale of threshing machines and agricultural machinery and implements increased until, in 1882, the company had over one million dollars of bills receivable, and claims for threshing machines, agricultural machinery and implements sold as above set forth.

In May, 1882, the company sold all its real estate, buildings, manufacturing property and plant used in said manufacturing business, and said bills receivable and claims due from its customers, as above set forth to the Northwestern Manufacturing and Car Company, a corporation organized for the "manufacture, building, and sale of steam engines of all kinds, and the manufacture, building, and sale of passenger cars, freight cars, flat cars, cattle cars, and all other kinds of cars, and the fixtures and attachments thereto belonging, and the manufacture and sale of farm implements and machinery of all kinds, and the manufacture and sale of all articles, implements, and machinery of which wood and iron form the principal component parts, and the manufacture of the materials therein used," and which had preferred and common stock.

Second. Said Northwestern Manufacturing and Car Company continued the manufacturing business at Stillwater, carrying on the same in the manner in which it had been carried on by Seymour, Sabin & Co. so far as it related to the manufacturing of threshing machines, agricultural machinery, and implements, and added thereto the business of manufacturing cars, and as a part thereof realized upon and collected the bills receivable and claims of Seymour, Sabin & Co. upon its customers. Subsequently the Northwestern Manufacturing and Car Company became embarrassed and unable to meet its obligations, and May 10, 1884, a receiver of said corporation and its property was appointed by the District Court of Washington Co., Minn., and said receiver took possession of the real estate, manufacturing property, plant, bills receivable, and other assets of said Northwestern Manufacturing and Car Company, and carried on the business under the orders of the court.

Third. Most of the creditors of the Northwestern Manufacturing and Car Company were in the New England States, and on Nov. 25, 1884, a meeting of the creditors was held at Boston, there being present about one hundred creditors representing in all two million dollars of indebtedness of the company, the total indebtedness being about two million six hundred thousand dollars. A
52 committee was appointed by that meeting and instructed to prepare the details of a plan of reorganizing the company, which was unanimously adopted by the creditors. The proceedings of that meeting, and its action, and the plan of reorganization adopted were as follows:

To the creditors of the Northwestern Manufacturing and Car Company, of Stillwater, Minn.:

Pursuant to the instructions of a large meeting of the creditors held at Boston on the 25th day of November, 1884, at which about one hundred creditors were present, representing nearly two million dollars of the indebtedness, the undersigned, your committee, appointed at such meeting and instructed to prepare the details of the plan of reorganizing the company on the basis which was unanimously adopted by a vote of those present at the meeting referred to, beg leave to report as follows:

For the benefit of those creditors who were not present at the meeting, your committee desires to state that representatives of the

company and Colonel Bend, an expert accountant residing at St. Paul, Minn., who has been in the employ of the receiver, but had not previously been connected with the company, presented to the meeting the full detailed inventory of all the assets and liabilities of the company. Considerable time was taken up in a thorough analysis of the assets.

It appears plainly to the meeting and to your committee that the valuation put upon these assets by the receiver, as disclosed in the inventory and the printed statement heretofore distributed among the creditors, was an eminently conservative valuation, if the business of the company should be continued, but if the company's affairs are to be closed up and the assets sold out for cash, the valuation made by the receiver would be much too high. This arises from the nature of the assets. For illustration, take the first item of the inventory:

"Cars and machines constructed and in process of construction, and materials for same, $1,535,887.70."

While the valuation of this item made by the receiver as stated is considerably below the actual cost, from an inspection of the details the item appears to consist largely of lumber, iron, etc., bought with special reference to this business and still further depreciated in value for the general market, by being partly cut up and shaped for these particular machines, it is quite evident that if the company should go out of business, thus necessitating the selling of this material, much of the iron would only be valuable as scrap, and much of the lumber as kindling wood, and instead of realizing for the creditors $1,500,000 in round numbers, at best would realize but a few hundred thousand dollars. For reasons hereafter stated it is considered impracticable to work this material up into completed machines and then quit the business.

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The real estate valued at $413,526.50 is pretty much all in Stillwater, a city very largely dependent upon the business of this company, and therefore the destruction of its business would affect the value of this property unfavorably to a very considerable although probably not to the same extent as the previous item.

The item of "machinery, tools, and fixtures, $127,489.60," all experience proves conclusively belongs to the same category, and as much of the machinery and many of the tools of this concern are designed especially for this particular business and worthless for any other, it is evident but very little would be realized from the sale of them.

The whole list of assets is to a greater or less extent subject to the same conditions, and your committee will only make special mention of one other item which is a very large one, viz.: "Bills receivable and accrued interest, $1,524,007.48." The bulk of this item consists of

Farmers' notes	$1,245,000.00
Accrued interest on same	155,000.00
Total	$1,400,000.00

This is the receiver's valuation and is at the rate of seventy-eight per cent. of the face value. The face value would therefore be $1,780,000.00 in round numbers. They consist of notes, varying in amounts from $100, to $800 and $900, given by farmers living largely in remote and sparsely settled districts in Minnesota, Dakota, Iowa, Missouri, Nebraska, Kansas, Texas, and the Pacific States, with scattering makers through some of the older western and southwestern States. In a majority of instances there is no collateral security except the machines sold.

With the company in existence keeping up its agencies to sell additional machines, each agent carrying a full stock of separate parts of the machines (technically known as "repairs") to replace any parts which may break or wear out, the experience of other concerns engaged in selling like machinery on these terms seems to warrant the conclusion that ninety-five per cent. of these notes will be ultimately collected.

But if the company closes up its affairs and quits the business, it may practically destroy the value in the hands of the farmer of many of the machines which may have been sold and for which these notes were given. Because, as soon as a cog-wheel or other part of his machine breaks or wears out, the owner would be unable to replace it; hence his machine becomes useless and he must of necessity throw it aside and buy another of some existing concern who will be able to furnish the needed "repairs." When his machine has thus become useless to him, by reason of the failure of the company to carry out the implied contract which always exists between the vendor and vendee of this class of machinery, and he is called upon to pay for it, the chances are that he will demur. He will think he has an equitable if not a legal defence and be slow and loath to pay. The same reason which would make it hard to collect notes given in payment for machines already sold would make it quite impossible to sell new machines; hence it would be impracticable to work up material now on hand into machines, sell the machines, and then quit the business.

This condition of affairs would evidently much reduce the actual value of this large asset of the company, and would probably carry it far below the receiver's valuation.

Another fact appeared at the meeting which the statement of the receiver does not disclose, which is of great importance in this connection.

It is that over $1,300,000 of these farmers' notes are hypothecated to secure about $1,000,000 of the company's "bills payable," thus removing this large amount from the assets available to pay the unsecured liabilities of the company.

The foregoing are in brief the facts brought out at the meeting, as your committee understood them, and in view of which it seemed to be the unanimous opinion of the creditors present that it was for the best interests of all concerned as creditors to reorganize the company on the basis of giving each creditor the par value of his claim in a preferred stock which should practically amount to a first lien

on all the unhypothecated assets of the company, and a com-
55 mon stock to the present preferred stockholders of the company, and your committee was instructed to take the necessary steps and prepare details for carrying into effect the reorganization desired.

Plan of Reorganization.

Acting under your instructions, your committee has had the articles of association required under the laws of Minnesota to form a new corporation drawn up and executed, a copy of which accompanies this report. This new corporation is to be called the "Minnesota Thresher Manufacturing Company."

The objects for which it is organized are:

First. To buy the claims and indebtedness against the old company by giving to the creditors the preferred stock of the new company at par for their claims, with interest added at the rate of seven per cent. per annum up to Jan. 1, 1885.

Second. To buy the preferred stock of the old company by giving one share of common stock of the new company in exchange for one share of preferred stock of the old company.

Third. To purchase at the judicial sale, which will ultimately be made in the action now pending wherein the present receiver has been appointed, all the assests, including the good will of the old company as an entirety and as a "going concern."

Fourth. Thereafter continue the business of the old company in all its branches except the manufacture of cars.

The management of this new corporation has been placed in thirteen directors who shall be stockholders, and elected by the stockholders. Until the first meeting of the stockholders in June next, the following persons have been designated as directors, all of whom, except two who are stockholders of the old company, represent large creditors:

Directors.

Ezra Farnsworth, of Boston National Bank, Boston, Mass.
John S. Fogg, of Fogg Bros. & Co., Boston, Mass.
Francis A. Osborn, Tremont National Bank, Boston, Mass.
56 Samuel R. Payson, National City Bank, Boston, Mass.
John B. Bacon, First National Bank, Chelsea, Vt.
Gustavus F. Davis, City National Bank, Hartford, Conn.
William H. Rhawn, National Bank of the Republic, Philadelphia, Pa.
W. E. Rice, City National Bank, Worcester, Mass.
O. D. Baldwin, Fourth National Bank, New York.
Abraham O. Bigelow, Massachusetts National Bank, Boston, Mass.
Edward F. Lawrence, First National Bank, Chicago, Ill.
A. B. Stickney, President M. & N. W. R. R. Company, St. Paul, Minn.
R. F. Hersey, Hersey, Bean & Brown, Stillwater, Minn.

Preferred Stock of the New Company.

By the terms of the new organization it will be seen that the preferred stock is made a first lien upon all the assets of the company both to secure its preference dividend of seven per cent. per annum, and to secure its par value when the concern is closed up (if ever it shall be) by voluntary liquidation or otherwise. The annual net earnings of the company are to be applied as follows:

1st. To pay a dividend on the preferred stock to the extent of seven per cent. of its par value.

2d. Any earnings more than enough to pay this dividend of seven per cent. on the preferred stock are to be retained by the company and carried to its surplus account until a sum equal to ten per cent. of its outstanding preferred stock shall have been accumulated. If in any year the earnings of the company are insufficient to pay a dividend of seven per cent. on its preferred stock, the deficiency may be made good out of the surplus, in which case no dividend can be paid on the common stock until out of its earnings after paying the preference dividend this surplus fund has been fully restored.

3d. The surplus fund having been realized and remaining unimpaired after payment of seven per cent. on its preferred stock, the board of directors may, if they think it prudent, declare and pay not exceeding seven per cent. on the common stock.

4th. If after seven per cent. has been paid on both the com-
57 mon and preferred stock, as before explained, there should remain net earnings of any year which the directors should deem advisable to divide, this surplus will be divided pro rata between all the common and preferred stockholders.

Place of Business.

The principal place of business as named in the articles is St. Paul, Minn. This does not mean that it is proposed to remove the factory, shops, etc., from Stillwater, but as St. Paul is the principal financial and railroad centre of the State, your committee was unanimous in opinion that the financial business offices of the company should be in that city.

With the explanations given it is believed the articles of association will be fully understood.

In conclusion your committee desires to remind the creditors that the successful carrying out of this plan of reorganization will be greatly facilitated by prompt action on their part, and they have therefore caused a form of subscription to the preferred stock of the new company to be prepared and sent out to the creditors with this report. If you desire to avail yourself of it please fill out the blank subscription and mail it to any one of the committee.

No individual liability attached to a subscription, and the stock when issued will be full paid and non-assessable.

All of which is respectfully submitted.

Dated Nov. 29, 1884.

EZRA FARNSWORTH,
JOHN H. FOGG,
FRANCIS A. OSBORN,
SAMUEL R. PAYSON,
JOHN B. BACON,
GUSTAVE F. DAVIS,
W. H. RHAWN,
Committee.

58 *Form of Subscription to the Preferred Stock of the Minnesota Thresher Manufacturing Company.*

Whereas, the Minnesota Thresher Manufacturing Company has been incorporated under the laws of the State of Minnesota for the purpose of purchasing claims and demands against the Northwestern Manufacturing and Car Company, and also the preferred capital stock of said last mentioned corporation, and finally to purchase at judicial sale all the assets of said last mentioned corporation, and thereafter to continue the business thereof.

Now therefore, Know all men by these presents that the undersigned, being a creditor of said Northwestern Manufacturing and Car Company, in consideration of like subscription by other creditors, do hereby subscribe to the preferred capital stock of said Minnesota Thresher Manufacturing Company, and do hereby agree to and with the Minnesota Thresher Manufacturing Company to assign to it the claims and demands which are more fully described in the schedule on the back of this paper at the face value thereof, with interest added at the rate of seven per cent. per annum until Jan. 1, 1885, and take in payment therefor the preferred stock of said Minnesota Thresher Manufacturing Company at par as soon as notified that certificates for said stock are ready for delivery.

The exchange of securities is to be made at the Tremont National Bank, Boston, Mass.

It is distinctly understood that this subscription does not bind the Minnesota Thresher Manufacturing Company to accept the same to a greater extent than the claims described in the schedule shall be found to be valid and existing claims against said Northwestern Manufacturing and Car Company.

Dated at ——, this — day of ——, 18—. —— Bank, By ——
P. O. Address ——.

59 *Articles of Association of the Minnesota Thresher Manufacturing Company.*

We, the undersigned, Ezra Farnsworth, John S. Fogg, Francis A. Osborn, Samuel R. Payson, all of Boston, Massachusetts; John B. Bacon, of Chelsea, Vermont; Gustavus F. Davis, of Hartford, Con-

necticut; William H. Rhawn, of Philadelphia, Pennsylvania; Alpheus B. Stickney, of St. Paul, Minnesota; and Roscoe F. Hersey, of Stillwater, Minnesota, do by these presents, pursuant to and in conformity with an act of the legislature of the State of Minnesota, entitled "An act relating to manufacturing corporations," approved March 7, 1873, and the several acts of said legislature amendatory thereof, associate ourselves together, and hereby form a body politic and corporate, and we do hereby certify:

First. That the corporate name of said corporation is "Minnesota Thresher Manufacturing Company."

Second. The objects for which this corporation is formed are the purchase of the capital stock, evidences of indebtedness issued by it, and the assets of the Northwestern Manufacturing and Car Company, a corporation existing under the laws of the State of Minnesota, or any portion of said capital stock, evidences of indebtedness or assets, and the manufacture and sale of steam engines of all kinds, farm implements and machinery of all kinds, and the manufacture and sale of all articles, implements and machinery of which wood and iron or either of them form the principal component parts, and the manufacture of the materials therein used.

Third. The capital stock of said corporation shall be seven millions of dollars, which shall be divided into one hundred and forty thousand shares of fifty dollars each. This stock shall be classified and issued in manner following, that is to say: There shall be issued two classes of stock, denominated preferred and common stock. The amount of the former shall be four millions of dollars, or eighty thousand shares of fifty dollars each; and of the latter three millions of dollars, or sixty thousand shares of fifty dollars each. The preferred stock shall be entitled to a dividend not exceeding seven per cent. per annum, payable out of the earnings of each calendar year, to be made up, if necessary, out of the surplus hereinafter provided for, commencing with the first day of January, 1885, which shall be declared and paid from the net earnings or surplus of the
60 corporation, before any dividend shall be declared or paid on the common stock; and no dividends shall be paid on the common stock until a surplus of ten per cent. on the outstanding preferred stock is accumulated. No part of said surplus shall be used except to make the preference dividend on the preferred stock seven per cent. when the earnings of any year shall be insufficient to pay seven per cent. on the preferred stock. Whenever any portion of the surplus is thus used, or whenever the surplus is otherwise impaired, the surplus shall be fully restored before any dividend is paid on the common stock. After a dividend of seven per cent. shall have been paid on both the preferred and common stock in any calendar year out of the earnings of said corporation for that year, both the preferred and common stock shall be entitled to participate equally in any further dividend which may be declared and paid out of the net earnings of that year. In case of the voluntary or other dissolution of the corporation, the preferred stock, to the extent of its par value, shall be first paid out of the assets

of the corporation, before any payment shall be made upon the common stock. After a surplus has been accumulated as hereinbefore provided, and while it so remains unimpaired, as so provided, the common stock shall be entitled to such dividend as the board of directors may determine to pay from the net earnings of the corporation for each calendar year after paying the dividends on the preferred stock; provided always, that after a dividend of seven per cent. shall have been declared and paid out of the net earnings of the corporation for any calendar year on both the preferred and the common stock, both the preferred and the common stock shall be entitled to participate equally in any further dividends which may be declared and paid out of the net earnings.

Fourth. Said corporation shall commence on the twenty-sixth day of November, 1884, and shall continue in existence for the term of thirty years, and its affairs shall be managed by a board of directors consisting of thirteen stockholders, who shall be elected annually. Provided, that the first board of directors, who shall hold their office until the first election by the stockholders, which election shall be on the third Wednesday of June, 1885, shall consist of the following persons: Ezra Farnsworth, John S. Fogg, Francis A. Osborn, Samuel R. Payson, John B. Bacon, Gustavus F. Davis, Wm. H. Rhawn, Alpheus B. Stickney, Roscoe F. Hersey, W. E. Rice, Octavus D. Baldwin, Abram O. Bigelow and Edward F. Lawrence.

61 Fifth. The principal place of business of this corporation shall be in the city of St. Paul, county of Ramsey, and State of Minnesota.

We hereby adopt the foregoing articles of association of the Minnesota Thresher Manufacturing Company, for the purpose of becoming a body politic and corporate under said name.

In witness whereof we have hereunto set our hands and seals this twenty-sixth day of November, A. D. 1884.

EZRA FARNSWORTH, [SEAL.]
JOHN S. FOGG, [SEAL.]
FRANCIS A. OSBORN, [SEAL.]
JOHN B. BACON, [SEAL.]
WM. H. RHAWN, [SEAL.]
ALPHEUS B. STICKNEY. [SEAL.]

Signed, sealed and delivered by
EZRA FARNSWORTH,
JOHN S. FOGG,
FRANCIS A. OSBORN,
JOHN B. BACON,
WM. H. RHAWN, AND
ALPHEUS B. STICKNEY,
In the presence of
W. B. BEND,
L. VERNON BRIGGS.

SAMUEL R. PAYSON. [SEAL.]

Signed, sealed and delivered by
SAMUEL R. PAYSON,
In the presence of
EDGAR S. BRISTOL,
L. VERNON BRIGGS.

GUSTAVUS F. DAVIS. [SEAL.]

Signed, sealed and delivered by
G. F. DAVIS,
In the presence of
C. T. WELLES,
W. B. BEND.

ROSCOE F. HERSEY. [SEAL.]

Signed, sealed and delivered by
R. F. HERSEY,
In the presence of
E. L. HERSEY,
PAUL GORES.

STATE OF MASSACHUSETTS, *County of Suffolk, ss:*

Be it known that on this 26th day of November, A. D. 1884, personally came before me said Ezra Farnsworth, John S. Fogg, Francis A. Osborn, John B. Bacon, Wm. H. Rhawn, Alpheus B. Stickney, to me personally known to be the same persons de-
62 scribed in and who executed the foregoing articles of association, and they each for himself acknowledged that they executed the same freely and voluntarily.

[NOTARIAL SEAL.] L. VERNON BRIGGS,
Notary Public.

STATE OF MASSACHUSETTS, *County of Suffolk, ss:*

Be it known that on this 29th day of November, A. D. 1884, personally came before me said Samuel R. Payson, to me personally known to be the same person described in and who executed the foregoing articles of association, and he for himself acknowledged that he executed the same freely and voluntarily.

[NOTARIAL SEAL.] L. VERNON BRIGGS,
Notary Public.

STATE OF CONNECTICUT, *County of Hartford, ss:*

Be it known that on the 29th day of November, A. D. 1884, personally came before me said Gustavus F. Davis, to me personally known to be the same person described in and who executed the foregoing articles of association, and he for himself acknowledged that he executed the same freely and voluntarily.

[NOTARIAL SEAL.] C. T. WELLES,
Notary Public.

STATE OF ILLINOIS, *County of Cook, ss:*

Be it known that on this 1st day of December, A. D. 1884, personally appeared before me a notary public, in and for said county and State, Roscoe F. Hersey, to me known to be the identical person who signed the foregoing instrument, and in due form of law acknowledged that he executed the same freely and voluntarily for the uses and purposes therein expressed.

[NOTARIAL SEAL.]

PAUL GORES,
Notary Public.

Filed December 5, A. D. 1884, at 9 A. M.

FRED VON BAUMBACH,
Secretary of State.

Statement of the Actual Assets and Liabilities of the Northwestern Manufacturing and Car Company, May 10, 1884.

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Assets.

Cars and machines constructed and in process of construction and materials for same		$1,535,887.70
Viz:		
Car account	$74,955.95	
Thresher	751,649.22	
Repairs	210,516.92	
Branches	165,985.60	
Foundry account	17,968.59	
Jobbing account	44,441.75	
Supplies	255,819.67	
Rolling stock	14,550.00	
Real estate and buildings		413,526.50
Viz:		
Real estate	$302,639.57	
Buildings	78,080.00	
Land	19,553.87	
Property at Fargo, etc	13,253.06	
Machinery, tools, and fixtures		127,489.60
Viz:		
Machinery	$70,518.22	
General tools	17,550.15	
Foundry tools	23,468.13	
Steam heating	7,490.71	
Water works	8,462.39	
Bills receivable and accrued interest		1,524,007.48
Viz:		
B. R. Thresher	$1,245,000.00	
B. R. Sundry	87,707.98	
B. R. Sabin's Ad	20,204.92	

	Accrued interest	155,000.00	
	Judgments	16,094.58	
64	Patents, patterns, teams, etc		$99,483.06
	Viz:		
	Patents	$50,000.00	
	Patterns	20,748.11	
	Teams	5,765.63	
	Office fixtures	1,700.00	
	Office stationery	300.00	
	Fuel	1,700.00	
	Advertising matter	3,000.00	
	Brick yard	1,500.00	
	Cooperage	1,089.85	
	Electric light	1,010.00	
	Insurance	6,669.47	
	Accounts receivable		672,384.41
	Viz:		
	Sundry accounts receivable $354,041.10		
	Less estimated discount 181,656.69	$172,384.41	
	Seymour, Sabin & Co.'s account $1,518,040.30		
	Less estimated discount 1,018,040.30	500,000.00	
	Total assets		$4,372,778.75

Liabilities.

	Bills payable, $1,675,251.01, less in hands of brokers	$1,645,251.01	
	Accommodation paper, $1,032,430.66, less in hands of brokers	939,680.62	
	Accounts payable	242,444.66	
	Seymour, Sabin & Co. preferred stock guaranteed by car company	500,000.00	
65	Notes of Seymour, Sabin & Co. secured by Car Co. B. R.	$40,000.00	
	Notes of D. M. Sabin secured by Car B. R.	18,500.00	
	Contingent liabilities (estimate of loss on discount bills receivable)	20,483.20	
	Total liabilities		$3,406,359.49
	Surplus as to creditors		$966,419.26

E. S. BROWN, *Receiver.*

Fourth. The Minnesota Thresher Manufacturing Company was organized and its stock subscribed for and paid in the claims and demands of the creditors against the Northwestern Manufacturing and Car Company, and in the preferred capital stock of that company. The Minnesota Thresher Manufacturing Company did nothing from the time of its organization until its purchase of the assets of the Northwestern Manufacturing and Car Company, except to issue its stock according to the plan of reorganization, and borrow certain sums of money for the necessary expenses of its organization and of acquiring by the issue of its stock the claims against and the preferred stock of the Northwestern Manufacturing and Car Company.

Fifth. Oct. 27, 1887, the manufacturing property and plant of the Northwestern Manufacturing and Car Company, and all bills receivable, farmers' notes, and other assets, which had been acquired by it, or by the receiver in the conduct of its business, were sold by order of the court in one lot at auction and purchased by the Minnesota Thresher Manufacturing Company pursuant to the plan of reorganization. Jan. 5, 1888, all these assets were conveyed to the Minnesota Thresher Manufacturing Company by the master appointed by the Court to make the conveyance, and in February, 1888, the Minnesota Thresher Manufacturing Company took possession of these assets, opened books of account and began the transaction of business. By amended articles of association, the place of business of the Minnesota Thresher Manufacturing Company was changed to Stillwater, Minnesota, on December 1st, 1887.

66 *Sixth.* The Minnesota Thresher Manufacturing Company carried on business until Dec. 14, 1900, when it became embarrassed, and its property and business were placed in the hands of a receiver by order of the United States Circuit Court for the district of Minnesota, third division, upon proceedings to foreclose a mortgage to the Massachusetts Loan and Trust Company upon its property, and thereafter the receiver conducted the business of said company substantially in the manner in which it had been conducted by the company itself, until a decree of foreclosure was entered, and in default of payment thereunder the property of the Minnesota Thresher Manufacturing Company was sold on the twenty-fifth day of May, 1901, and said sale was confirmed and deeds of said property delivered to the purchaser July 8, 1901.

Seventh. On the 28th day of March, 1885, Simon Bernheimer, being a holder of preferred stock of the Northwestern Manufacturing and Car Company, as such, subscribed for and became the owner of two hundred shares of the capital stock of the Minnesota Thresher Manufacturing Company of the aggregate par value of Ten thousand dollars, and paid for the same by an assignment of his said shares of preferred stock of the Northwestern Manufacturing and Car Company, and said shares of the stock of the Minnesota Thresher Manufacturing Company were issued to, received, and accepted by said Simon Bernheimer, and he at all times until his death since the issue thereof continued to be the owner and holder of the same, as appears by the stock books of said Minnesota Thresher Manufacturing Company.

The defendants are not and never have been residents of the State of Minnesota, and were not parties to and had no knowledge in fact of the proceedings set forth in the complaint wherein the assessment sued upon was made by the District Court of Washington County, Minnesota, upon the stockholders of the Minnesota Thresher Manufacturing Company, but the plaintiff claims that such stockholder was in law represented by said Minnesota Thresher Manufacturing Company in said proceedings.

Eighth. And when the Minnesota Thresher Manufacturing Company was organized, and when said Simon Bernheimer became a stockholder therein, and at all times when said company became indebted to any creditors for the benefit of whom the assessment sued upon was made, the only liability of stockholders under the laws of Minnesota, or otherwise, was under Article 10, Section 3, of the Constitution of Minnesota, which was in the following words:

"Each stockholder in any corporation (excepting those organized for the purpose of carrying on any kind of manufacturing or mechanical business) shall be liable to the amount of stock held or owned by him."

and the only method of enforcing such liability was under the following sections of Chapter 76 of the General Statutes of Minnesota of the year 1878 as re-enacted in the General Statutes of 1894, to wit:

"SECT. 5897. Whenever a judgment is obtained against any corporation incorporated under the laws of this State, and an execution issued thereon is returned unsatisfied in whole or in part, upon the complaint of the person obtaining such judgment, or his representatives, the District Court within the proper county may sequestrate the stock, property, things in action and effects of such corporation, and appoint a receiver of the same.

"SECT. 5905. Whenever any creditor of a corporation seeks to charge the directors, trustees or other superintending officers of such corporation, or the stockholders thereof, on account of any liability created by law, he may file his complaint for that purpose in any district court which possesses jurisdiction to enforce such liability.

"SECT. 5906. The Court shall proceed thereon, as in other cases, and when necessary shall cause an account to be taken of the property and debts due to and from such corporation, and shall appoint one or more receivers.

"SECT. 5907. If, on the coming in of the answer or upon the taking of any such account, it appears that such corporation is insolvent, and that it has no property or effects to satisfy such creditors, the Court may proceed, without appointing any receiver, to ascertain the respective liabilities of such directors and stockholders, and enforce the same by its judgment, as in other cases.

"SECT. 5908. Upon a final judgment in any such action to restrain a corporation or against directors or stockholders, the Court shall cause a just and fair distribution of the property of such corporation and of the proceeds thereof to be made among its creditors.

"SECT. 5909. In all cases in which the directors or other officers

of a corporation, or the stockholders thereof, are made parties to an action in which a judgment is rendered, if the property of such corporation is insufficient to discharge its debts, the Court shall
68 proceed to compel each stockholder to pay in the amount due and remaining unpaid on the shares of stock held by him, or so much thereof as is necessary to satisfy the debts of the company.

"SECT. 5910. If the debts of the company remain unsatisfied, the Court shall proceed to ascertain the respective liabilities of the directors or other officers and of the stockholders, and to adjudge the amount payable by each, and enforce the judgment, as in other cases.

"SECT. 5911. Whenever any action is brought against any corporation, its directors or other superintending officers, or stockholders, according to the provisions of this chapter, the Court, whenever it appears necessary or proper, may order notice to be published in such a manner as it shall direct, requiring all the creditors of such corporation to exhibit their claims and become parties to the action, within a reasonable time, not less than six months from the first publication of such order, and, in default thereof, to be precluded from all benefit of the judgment which shall be rendered in such action, and from any distribution which shall be made under such judgment."

Ninth. April, 1899, the Legislature of Minnesota passed an "Act to provide for the better enforcement of the liability of stockholders of corporations," being Chapter 272, General Laws of Minnesota for the year 1899, which is as follows:

SECTION 1. Whenever any corporation created or existing by or under the laws of the State of Minnesota, whose stockholders or any of them are liable to it or to its creditors, or for the benefit of its creditors, upon or on account of any liability for or upon or growing out of, or in respect to the stock or shares at any time held or owned by such stockholders, respectively, whether under or by virtue of the constitution and laws of said State of Minnesota, or any statute of said State, or otherwise, has heretofore made or shall hereafter make any assignment for the benefit of its creditors under the insolvency laws of this State; or whenever a receiver for any such corporation has heretofore been or shall hereafter be appointed by any district court of this State, whether under or pursuant to any of the provisions of chapter seventy-six (76) of the General Statutes of eighteen hundred and ninety-four (1894) of Minnesota and the acts amendatory thereof, or under or pursuant to any other stat-
69 ute of this State or under the general equity powers and practice of such court; the district court appointing such receiver or having jurisdiction of the matter of said assignment may proceed as in this act provided.

SECT. 2. Upon the petition of the assignee or receiver of any such corporation, or of any creditor of such corporation who has filed his claim in such assignment or receivership proceedings, the said district court shall by order appoint a time for hearing not less than thirty (30) nor more than sixty (60) days from the time of filing said petition with the clerk of said Court, and shall direct such notice of such hearing to be given by the party presenting said petition, by

publication or otherwise, as the Court in its discretion may deem proper; but if said petition be filed by a creditor, other than the assignee or receiver of said corporation, the Court shall direct that notice of such hearing be personally served on such assignee or receiver.

SECT. 3. At such hearing the Court shall consider such proofs by affidavit or otherwise, as may then be offered by the assignee or receiver, or by any creditor or officer or stockholder of said corporation, who may appear in person or by attorney, as to the probable indebtedness of said corporation and the expenses of said assignment or receivership, and the probable amount of assets available for the payment of such indebtedness and expenses; and also as to what parties are or may be liable as stockholders of said corporation and the nature and extent of such liability. And if it appear to the satisfaction of the Court that the ordinary assets of said corporation, or such amount as may be realized therefrom within a reasonable time, will probably be insufficient to pay and discharge in full and without delay its indebtedness and the expenses of such assignment or receivership, and that it is necessary or proper that resort be had to such liability of its stockholders: the said Court shall thereupon by order direct and levy a ratable assessment upon all parties liable as stockholders, or upon or on account of any stock or shares of said corporation, for such amount, proportion or percentage of the liability upon or on account of each share of said stock as the Court in its discretion may deem proper (taking into account the probable solvency or insolvency of stockholders and the probable expenses of collecting the assessment); and shall direct the payment of the amount so assessed against each share of said stock to the assignee or receiver within such time thereafter as said Court may specify in said order.

SECT. 4. Said order shall direct the assignee or receiver to proceed to collect the amount so assessed against each share of said stock from the parties liable therefor; and shall direct and authorize said assignee or receiver, in case of the failure of any party liable upon or on account of any share or shares of said stock to so pay the amount so assessed against the same within the time specified in said order, to prosecute actions against each and every such party so failing to pay the same, wherever such party may be found, whether in this State or elsewhere.

SECT. 5. Said order and the assessment thereby levied shall be conclusive upon and against all parties liable upon or on account of any stock or shares of said corporation, whether appearing or represented at said hearing or having notice thereof or not, as to all matters relating to the amount of and the propriety of and necessity for the said assessment. This provision shall also apply to any subsequent assessment levied by said Court as hereinafter provided.

SECT. 6. It shall be the duty of such assignee or receiver to, and he may, immediately after the expiration of the time specified in said order for the payment of the amount so assessed by the parties liable therefor, institute and maintain an action or actions against any and every party liable upon or on account of any share or shares of said

stock who has failed to pay the amount so assessed against the same, for the amount for which such party is so liable. Said actions may be maintained against each stockholder, severally, in this State or in any other State or country where such stockholder, or any property subject to attachment, garnishment or other process in an action against such stockholder, may be found. But if said assignee or receiver shall in good faith believe any stockholder so liable to be insolvent, or that the expense of prosecuting such action against such stockholder will be so great that it will be of disadvantage to the estate and the interest of creditors to prosecute the same, said assignee or receiver shall so report to said Court; and shall not be required to institute or prosecute any such action unless specifically directed so to do by said Court. And in such case said Court shall not require said receiver to institute or maintain such action unless said Court shall have reasonable cause to believe that the result of such action will be of advantage to the estate and creditors of said corporation, except as hereinafter provided.

SECT. 7. In any case where the Court shall have levied an
71 assessment against stockholders as in this act provided, for a less amount or proportion than the full amount of the liability upon or on account of the stock of said corporation, and it shall thereafter be made to appear to the satisfaction of said Court, by petition or otherwise, and upon hearing as hereinbefore provided, that by reason of the insolvency of stockholders, or for any other cause, it is necessary or desirable or for the interest of creditors that another and further assessment upon or against said stock be levied, the Court shall by order direct and levy a further and additional assessment for such amount, proportion or percentage of the liability upon or on account of each share of said stock, as the Court in its discretion may deem proper, and in the same manner may levy further and additional assessments upon said stockholders, and against said stock, not exceeding in the aggregate, the maximum amount of liability upon or on account of the stock of said corporation.

SECT. 8. All the provisions of this act shall apply to any such assessment levied by said Court after the first, and to the proceedings preliminary to levying and directing the same, to the same extent and with the same force and effect as to the first assessment so levied under the provisions of this act.

SECT. 9. Where two (2) or more such assessments are levied or directed, the assignee or receiver may join the causes of action accruing against any stockholder upon any two or more such assessments in a single action against such stockholder or he may, at his discretion, unless otherwise directed by the Court, maintain a separate action against each stockholder for each successive assessment levied or directed.

SECT. 10. If said assignee or receiver shall fail to institute and prosecute an action against any stockholder who has failed to pay any such assessment or assessments, or to prosecute such an action with diligence after instituting the same, any stockholder or stockholders who have paid in full the amount of any such assessments, or any creditor or creditors of said corporation, may petition said Court

to require said assignee or receiver to prosecute such action against such stockholders so failing to pay as aforesaid, or to permit the party or parties so petitioning to institute and maintain, or to continue the prosecution of such action in the name of said assignee or receiver, and for the benefit of said estate, and if said party or parties
72 so petitioning shall furnish security or indemnity for costs and expenses as the Court may direct, the said Court shall thereupon require said assignee or receiver to forthwith prosecute such action, or in its discretion may permit such party or parties so petitioning to institute and prosecute or continue the prosecution of the same as aforesaid.

SECT. 11. If, after the payment of all the expenses of such assignment or receivership, and all indebtedness of and claims against said corporation proved or allowed in said proceedings, there shall remain any surplus money or property in the hands of the assignee or receiver, the same shall be distributed, under the direction of said Court, and in such a manner as may be just and equitable, among those stockholders who have paid the assessments levied against their stock as herein provided. And any stockholder who has so paid such assessments levied against his stock shall, in addition to any remedy herein provided for, be entitled to enforce contribution from stockholders who have not paid such assessments, and for that purpose may be subrogated to the rights of the creditors of said corporation against such defaulting stockholders, in such manner and to such extent as may be just and equitable.

SECT. 12. Whenever, in a proceeding heretofore instituted under the then existing laws of this State to enforce the liability of stockholders of any such corporation, a portion of the amount for which the stockholders of such corporation are liable has been collected, but the amount so collected is insufficient to pay and discharge claims against said corporation in full, and there remain stockholders who were not made parties to such proceedings, then, notwithstanding final judgment may have been rendered and entered in said proceeding against those stockholders who were made parties thereto, the district court having jurisdiction may proceed as in this act provided and may levy assessments in the manner herein prescribed to such extent as may be necessary to satisfy and discharge in full all claims against said corporation and all expenses of such proceedings. And the assignee or receiver, or the receiver appointed by said Court in such proceeding, may institute and maintain actions to recover the amount of such assessments in the same manner, with the same effect, as in the case of an assessment levied as provided in the preceding sections of this act, and all the provisions of this act shall apply to any stockholder who has paid, or from whom has been collected, in the course of such prior proceeding, any portion
73 of the amount for which he is liable for or on account of the stock held or owned by him, shall be credited upon any assessment levied against said stock as in this section provided with the full amount so paid by or collected from him.

SECT. 13. This act shall not apply to any action now pending to which stockholders of such corporations have been made parties under the provisions of chapter seventy-six (76), General Statutes of

eighteen hundred and ninety-four (1894), and acts amendatory thereto, and in which the issue as to who are stockholders has heretofore been tried and determined by the courts; except that after final judgment in such action, if a proper case exists under the provisions of section twelve (12) of this act, the Court and parties may proceed in the manner prescribed by said section twelve (12).

SECT. 14. All acts and parts of acts inconsistent herewith are hereby repealed.

SECT. 15. This act shall take effect and be in force from and after its passage.

Approved April 18, 1899.

Tenth. On May 6, 1901, the Merchants National Bank of St. Paul, Minn., a corporation duly organized and existing under the laws of the United States, recovered a judgment in the district court for Ramsey Co., Minn., against the Minnesota Thresher Manufacturing Company, for the sum of $2,938.07, on which judgment executions were issued and returned unsatisfied by the sheriffs of Washington Co. and of Ramsey Co., Minn. After the return of said executions said Merchants National Bank instituted in the district court for the county of Washington and State of Minnesota, a court of record and general jurisdiction, an action against said Minnesota Thresher Manufacturing Company, the summons, complaint, and return of service in which were as follows:

74 STATE OF MINNESOTA, *County of Washington, ss:*

District Court, First Judicial District.

* * * * * * *

MERCHANTS NATIONAL BANK OF ST. PAUL, MINN., Plaintiff,

v.

MINNESOTA THRESHER MANUFACTURING COMPANY, Defendant.

* * * * * * *

Summons.

The State of Minnesota to the above named defendant:

You are hereby summoned and required to answer the complaint of the plaintiff in the above entitled action, a copy of which is hereto attached and herewith served on you, and to serve a copy of your answer to the said complaint on the subscribers, at their office in the city of St. Paul in the county of Ramsey and State aforesaid, within twenty days after the service of this summons upon you, exclusive of the day of such service; and if you fail to answer said complaint within the time aforesaid, the plaintiff in this action will apply to the Court for the relief demanded in the complaint, besides the costs and disbursements of this action.

DAVIS, KELLOGG & SEVERANCE,
Plaintiff's Attorneys, Merchants National Bank Building, St. Paul, Minn.

Filed Aug. 17, 1901.
A. K. DOE, *Clerk.*

* * * * * * *

STATE OF MINNESOTA, *County of Washington:*

District Court, First Judicial District.

MERCHANTS NATIONAL BANK OF ST. PAUL, MINN., Plaintiff,
v.
MINNESOTA THRESHER MANUFACTURING COMPANY, Defendant.

Complaint.

* * * * * * *

And now comes the plaintiff above named and for its complaint against the defendant avers:

75 1. That plaintiff is and during all the times hereinafter mentioned has been a corporation organized, existing, and doing business under and by virtue of the laws of the United States of America as a national bank, having its principal office and place of business at St. Paul, in the State of Minnesota.

2. That the defendant, Minnesota Thresher Manufacturing Company, is and during all the times hereinafter mentioned has been a corporation organized, existing, and doing business under and by virtue of the laws of the State of Minnesota, having its principal office and place of business in Stillwater in said State.

3. That at the city of Stillwater, Minn., on Nov. 1, 1900, the defendant made, executed, and delivered to the plaintiff its promissory note in writing dated on that day, by it signed, wherein and whereby for value received it promised and agreed to pay to the order of the plaintiff the sum of $2,900, four months after said date; that said note was given for money loaned to said defendant long prior to said Nov. 1, 1900, and that said note was a renewal of notes previously given evidencing the said debt; that the said indebtedness was created on or about the 3d day of June, 1889. That plaintiff is still the owner and holder of said debt against the defendant, and that no part of the same has been paid.

4. That heretofore and on or about the fourth day of March, 1901, the plaintiff brought an action against the defendant in the District Court for Ramsey Co., Minn., upon the said note of $2,900, and in said action sought judgment against the defendant for the sum of $2,900 and interest thereon since March 4, 1901, besides the costs and disbursements of said action.

That the summons and complaint in said action were duly served upon the said defendant on said March 4, 1901, and said District Court for Ramsey Co., Minn., duly had and acquired jurisdiction of the said cause and the parties thereto and the subject matter thereof, and such proceedings were thereafter duly had, that on the sixth day of May, 1901, judgment was duly entered and docketed in the said court in favor of the plaintiff and against the defendant for the sum of $2,938.07, and that said judgment remains wholly unpaid.

That thereafter and on the eighth day of May, 1901, the said judgment was duly entered and docketed in the county of Washington and State of Minnesota; that on the eleventh day of July, 1901, an

execution was duly issued out of and under the seal of said district court for Ramsey Co., Minn., directed to the sheriff of said
76 county of Ramsey, directing him to satisfy the said judgment out of any property of said defendant that he might find upon which such execution could be levied, and that on the twelfth day of July, 1901, the said sheriff duly returned said execution, and stated in his return that after diligent search and inquiry he had been unable to find any property upon which the same could be levied or out of which the same could be satisfied, and therefore returned said execution wholly unsatisfied.

That on the eleventh day of July, 1901, another execution was duly issued out of and under the seal of said district court for Ramsey Co., Minn., directed to the sheriff of the said county of Washington and State of Minnesota, commanding him to satisfy the said judgment out of any property that he might find subject to the levy of such execution.

That on the thirteenth day of July, 1901, the said sheriff of Washington Co. duly returned said execution, and in his return recited that after diligent search and inquiry he had been unable to find any property subject to the levy of such execution, and he therefore returned such execution wholly unsatisfied.

Plaintiff further alleges that the said defendant corporation has no property out of which the said judgment can be satisfied.

That in the year 1888 all of the property of said defendant corporation then owned by it, or thereafter to be acquired, was mortgaged, conveyed, transferred and set over to the Massachusetts Loan and Trust Company, a corporation organized and existing under the laws of the State of Massachusetts, having authority to act as trustee of mortgage indentures, and that various supplementary mortgages were given to said Massachusetts Loan and Trust Company in addition to said original mortgage so made in the year 1888.

That said mortgage was given to secure an issue of $1,600,000 par value of first mortgage bonds of said defendant, which said bonds were duly signed and certified by said trustee, issued and sold to various innocent holders for value.

That after the making of said mortgage in the year 1888 and the sale of said bonds, all of the same, with the exception of $492,000 par value of said bonds, were paid and satisfied by said defendant.

That default having been made in the conditions of said mortgage securing said issue of bonds, the said Massachusetts Loan and
77 Trust Company duly filed its bill of foreclosure in the United States Circuit Court for the District of Minnesota and the Third Division thereof, on the fourteenth day of December, 1900, and that on said day a writ of subpoena was duly issued out of said United States Circuit Court and served upon the said defendant corporation. That such proceedings were duly had in said cause, that on said day a receiver was appointed of all the property of said defendant. That said receiver accepted the said trust, and at once entered into possession of said property and retained the same in his possession until the sale of the same under foreclosure, as hereinafter alleged:

That thereafter such proceedings were duly had that on the tenth day of April, 1901, a decree of foreclosure was duly entered in said cause so pending in said United States Circuit Court, wherein among other things it was adjudged that the full amount of said bonds, to wit, the said sum of $492,000, together with interest thereon, was due and payable, and it was further adjudged that unless within five days from the date of said decree the amount due thereon should be paid; that all of said property should be sold at public auction by a special master appointed by said decree, at the times and in the manner provided by said decree, and that such sale should be made without redemption; that said sum nor any part of the same was not paid; and pursuant to said decree, and on the twenty-fifth day of May, 1901, all of the property of said defendant corporation, of every kind and nature and wheresoever situated, was sold by said special master, and on the twelfth day of June, 1901, the said sale was by said United States Circuit Court duly confirmed, and thereafter the said special master, the said Massachusetts Loan and Trust Company and said Minnesota Thresher Manufacturing Company joining therein, executed and delivered to such purchaser a deed covering, conveying, transferring, and setting over to such purchaser all of the property of said defendant, real, personal, and mixed of every kind and nature, and wheresoever situated, and said purchaser took possession of said property and paid the purchase price therefor.

That by reason of such foreclosure sale the defendant has no property whatsoever out of which the judgment of the plaintiff or any part of the same can be paid or satisfied.

5. Plaintiff further alleges that under its charter the authorized capitalization of the defendant, Minnesota Thresher Manu-
78 facturing Company, is $7,000,000, to wit: $4,000,000 par value of preferred stock and $3,000,000 par value of common stock, each of said issues of stock being divided into shares of $50 each.

That of said $4,000,000 authorized issue of preferred stock there has been issued and is now outstanding 27,967 shares of $50 each; that of said authorized issue of $3,000,000 of common stock there has been issued and is now outstanding 42,594 shares of the par value of $50 each, and plaintiff alleges that the said stock was not fully paid for by the holders and parties to whom the same was issued.

That hereto attached and marked "Exhibit A" is a schedule showing the holders of all of the preferred stock and the holders of all of the common stock of said defendant outstanding, together with the number of shares of stock held by each of the said stockholders respectively, and said "Exhibit A" also shows the various transfers of preferred and common stock of said corporation at all times since the cause of action of the plaintiff herein accrued, showing the holder of said stock, the number of shares held by him, the date the same was transferred, the party to whom the same was transferred, and the number of shares so transferred, together with the post-office address of the transferrer and the transferree in each case, and that said lists of the present holders of preferred

and common stock of said corporation also show the post-office address of the said stockholders respectively, as plaintiff is informed and believes, and all the recitals and statements contained in said "Exhibit A" are hereby referred to and alleged as part of this complaint as fully as though herein set forth at length.

6. Plaintiff further avers that in addition to the judgment so held by this plaintiff against said defendant, said defendant is indebted in other and large sums of money to various persons and corporations, as plaintiff is informed and believes, which said indebtedness aggregates, as plaintiff is informed and believes, a sum in excess of $300,000, and this action is brought by plaintiff on its behalf and on behalf of all of the creditors of said defendant who may intervene and become parties hereto.

7. Plaintiff further avers that plaintiff is without remedy to secure its said claim or any part of the same, and that all the other creditors of said defendant are without remedy to secure their said claims, except by and through the appointment of a receiver of said defendant, with authority to sue for and enforce the
79 liability of the stockholders of said defendant created by the constitution and laws of the State of Minnesota, and the various amounts unpaid upon the said stock.

Wherefore, plaintiff prays that this Honorable Court may sequestrate the stock, property, things in action, and effects of said defendant, said Minnesota Thresher Manufacturing Company, and that a receiver of said defendant corporation may be appointed in this cause, with authority to take into possession all of the property and effects of said defendant, and with authority to sue for, recover, and receive the amounts due from the various stockholders of said defendant corporation wherever the same may be, and whether said stockholders are within the jurisdiction of the courts of Minnesota or otherwise, and that said receiver be given such further powers, and that such other and further duties be imposed on him as to the Court may seem desirable and proper, and that the funds collected or received by said receiver, including the sums collected by him from such stockholders, be distributed among the various creditors of said defendant corporation entitled thereto, and that plaintiff have such other and further relief as to this Court may seem just and equitable.

DAVIS, KELLOGG & SEVERANCE,
Plaintiff's Attorneys, Merchants National Bank Building, St. Paul, Minn.

STATE OF MINNESOTA, *County of Ramsey, ss:*

Kenneth Clark came before me personally, and, being duly sworn, doth say that he is the president and an officer of plaintiff in the above entitled action, that the foregoing pleading is true of his own knowledge, except as to those matters which are therein stated on his information and belief, and as to those matters that he believes it to be true.

KENNETH CLARK.

Subscribed and sworn to before me this 14th day of August, A. D., 1901.

[NOTARIAL SEAL.] C. A. SEVERANCE,
Notary Public, Ramsey County, Minnesota.

Endorsed: 6409. Original. District Court, Washington County. Merchants National Bank of St. Paul *v.* Minnesota Thresher
80 Manufacturing Company. Summons and Complaint. Davis, Kellogg & Severance, attorneys for plaintiff. Merchants National Bank Building, St. Paul, Minn. Filed Aug. 17, 1901. A. K. Doe, clerk.

STATE OF MINNESOTA, *County of Washington*, *ss:*

I hereby certify and return that on the 15th day of August, 1901, at the city of Stillwater, State of Minnesota, I served the within summons and complaint upon the defendant Minnesota Thresher Manufacturing Company, by handing and leaving a correct copy thereof with E. D. Buffington the secretary of said company.

Dated this 15th day of August, 1901.

GRANVILL W. SMITH,
Sheriff of Washington County, Minn.
By IGNATIUS FAZENDIN, *Deputy.*

Sheriff's fees	1.00
Mileage	.20
	1.20 Paid.

Filed Aug. 17, 1901.
A. K. DOE, *Clerk.*

Eleventh. E. D. Buffington, on whom the summons in said action was served, was a creditor of said company in the sum of $65,725.50, and gave no notice of the service of said summons upon him to the directors of the company, or to any other officer of the company before the decree appointing the receiver therein was made, and neither the directors nor any other officer of the company had any knowledge of the bringing of said action before the order of sequestration and appointment of receiver therein hereinafter referred to was made by said District Court. But the directors were aware that creditors of said company had declared their intention to attempt to enforce the individual liability of stockholders by suit.

Article 1 of the By-laws of said Minnesota Thresher Manufacturing Company provides as follows:

Board of Directors.—The government and management of the affairs of this corporation shall be vested in a Board of Directors composed of not exceeding thirteen stockholders, who shall be elected annually by ballot by the stockholders at the annual meeting.

81 Article X. of the By-laws provides for the officers and their election, and is as follows:

Officers and their Election.—The officers may consist of a President, Vice-President, General Manager, Secretary, Assistant Secre-

tary, Treasurer, and Auditor, who shall be chosen by the Board of Directors at the regular annual meetings of the Board. Said officers shall hold their respective offices for one year or during the pleasure of the Board of Directors, and until their successors are duly elected and qualified, and their compensation shall be fixed by the Board of Directors or the Executive Committee. In case of no election as herein provided, the same may be had at any meeting of the Board.

Said officers shall give such bonds for the faithful performance of duty as the Board of Directors shall direct. All elections shall be by ballot.

The duties of the Secretary were provided for in Article XIV. of the By-Laws, which is as follows:

Duties of the Secretary.—It shall be the duty of the Secretary to attend the meetings of the Board of Directors and of stockholders when met for the transaction of business, to keep an accurate record of all their proceedings, and to have charge of the records and papers of the corporation. He shall issue and sign all certificates of stock as Secretary, and perform such other duties as are usually incident to the office.

Mr. E. D. Buffington was elected Secretary of the company at the annual meeting of the Directors held at the office of the company in Stillwater, Minn., on June 18, 1890; and was again elected Secretary on June 17, 1891; and was again elected Secretary on June 22, 1892, at the annual meeting of the Directors of the company in Stillwater, Minn.; and on the same date at the office of the company, by vote of the stockholders, the following persons were elected directors of the company:

Henry D. Hyde, Boston, Mass.
D. N. Morgan, Bridgeport, Conn.
H. J. Crippen, Concord, N. H.
F. A. Osborn, Boston, Mass.
H. C. Fogle, Stillwater, Minn.
W. W. Blackmar, Boston, Mass.
E. D. Buffington, Stillwater, Minn.

82 This meeting, on June 22, 1892, was the last meeting of the stockholders of the company in which there was enough stock or bonds represented to constitute a quorum, and no election of directors was held by stockholders subsequent to said June 22, 1892; but, from time to time, as they died or resigned, others were elected to fill their places.

The last meeting of the directors of the company was held on June 29, 1901, when the following named persons were the directors of the company:

Stephen M. Crosby, of Boston, Mass.
William M. Mason, of Boston, Mass.
Benjamin D. Hyde, of Boston, Mass.
Everett Flint Damon, of Boston, Mass.
G. E. Clifford, of Boston, Mass.
E. D. Buffington, Stillwater, Minn.

Article IX. of the By-Laws provides for the meetings of directors as follows:

Meetings of Directors.—"The annual meetings of the Board of Directors shall be held on the same day and after the adjournment of the annual meeting of the stockholders in each year or at the conclusion of any meeting of the stockholders of the company at which the regular annual election has been held.

Special meetings of directors shall be held upon call by the President or by the majority of the members of the board, at such time and place as may be designated in the call, but no meeting of the Board of Directors shall be called upon less than ten days' notice given through the post-office, addressed to their place of residence, or five days' notice given to them in person or by telegraph and similarly addressed.

A majority of the board shall be necessary to constitute a quorum for business at any meeting. In case of a vacancy in the Board of Directors for any cause the board shall have power to fill the same."

Twelfth. That S. Blair McBeath is and in the year 1901 was an attorney-at-law duly admitted to practice in the courts of the State of Minnesota; that from the year 1896 said McBeath was the regular attorney for the Minnesota Thresher Manufacturing Company, and when any summons or other legal process was served upon the company the same was at once turned over to said McBeath
83 for attention; said McBeath acted as attorney for said company in the foreclosure action herein mentioned, and from the date of the deed under the foreclosure decree said McBeath did no further business for said company; E. D. Buffington had been chosen as the general manager of said Minnesota Thresher Manufacturing Company, as well as the secretary of said company, and prior to the commencement of the foreclosure suit hereinafter mentioned and no successor to him in those offices was thereafter chosen, and when the summons and complaint in said action, in which the plaintiff was appointed as receiver, were served on said Buffington, he at once handed the same to said McBeath and requested him to appear for said company in said cause. No other action was taken by said Buffington in regard to this summons, and the same was not brought to the attention of any other director or stockholder. Said McBeath had no other authority to appear; no further instructions were given him, he was not and at no time had been an officer or director of said company, and was engaged as attorney in 1896 and subsequent years only by the general manager and not by resolution of the directors of said Minnesota Thresher Manufacturing Company.

Thirteenth. On the sixteenth day of August, 1901, an order and decree was entered by said District Court in said action as follows:

STATE OF MINNESOTA, *County of Washington:*

District Court, First Judicial District.

* * * * * * *

MERCHANTS' NATIONAL BANK OF ST. PAUL, MINN., Plaintiff,
v.
MINNESOTA THRESHER MANUFACTURING COMPANY, Defendant.

* * * * * * *

The above entitled matter having come before the Court upon the motion of the plaintiff above named for a judgment and decree adjudging that the stock, property, things in action, and effects of said defendant be sequestered, and for the appointment of a receiver of the said defendant, and it appearing to the Court that due notice of said motion was given by serving the same upon the said defendant and upon S. Blair McBeath, its attorney, and the parties hereto having duly appeared, plaintiff by its attorneys, Messrs. Davis, Kellogg & Severance, and the defendant by its attorney, S. Blair McBeath, and evidence having been taken upon the said application and the Court having duly considered said matter, it is therefore

Ordered, decreed and adjudged that the stock, property, things in action, and effects of said defendant be sequestered, and
84 that Theodore R. Converse, of Stillwater, Minn., be, and he is hereby appointed receiver of the said defendant, and of all the property, estates, rights, and interests of said defendant of every sort or nature, either in law or equity, and with full authority to sue for, collect, recover, compromise, and settle any and all stockholders' liability that may exist under the constitution and laws of the State of Minnesota or otherwise, and to prosecute and sue for the amount of such liability or any assessments that may be made by this Court on account thereof for the satisfaction of the claims of the creditors of said defendant, and of the expenses of the administration of this trust, including the fees, allowances, and expenses of said receiver and his counsel, with full power and authority to sue for and enforce the collection of any assessments or stockholders' liability either in the courts of the State of Minnesota or the courts of any other State or territory or the courts of the United States, sitting in any State or territory of the United States, and with full power and authority to prosecute appeals or sue out writs of error in any such suits or causes that may be so instituted by said receiver for the collection of such assessments and stockholders' liability, and, in general, to do and perform all acts that in the opinion of said receiver or that he may be advised are needful or proper for the enforcement and collection of such assessments and stockholders' liability in any of the courts of the United States or of the various States and territories of the United States.

In addition thereto the said receiver is hereby vested with all the usual and ordinary powers of receivers in equity, and in addi-

tion to the specific authority hereinbefore given, said receiver is directed to seize and take into his possession, sue for, and recover any and all property of every sort and nature possessed by said corporation or to which it is entitled, if he is able to learn of any such property, and the officers and directors of said corporation, and each of them, are hereby ordered and directed to turn over to said receiver all books of account, stock books, stock registers, record and minute books, and all other records, property, and papers of said defendant of every sort and nature that may be in the possession of said directors or officers, or any of them, and said defendant corporation and its officers and directors, and all persons claiming by, through or under them, are hereby enjoined to refrain from interfering in any way with the possession of said property, records or books in said receiver, and the said receiver is hereby vested with full power
85 and authority at his discretion to employ and fix the pay and compensation of all such attorneys, agents, employees as shall in his opinion be necessary to aid him in the proper discharge of his duties as such receiver, and the plaintiff herein and all creditors who may intervene in this cause are hereby instructed to make all such assignments and to do and perform all such acts as may be required by said receiver to aid in the administration of said trust, and to assist in the enforcement of such stockholders' liability, in any of said jurisdictions; and said receiver is directed to hold all funds that may come into his hands by virtue of his said receivership or any acts done thereunder, and all moneys which he may receive by or through the enforcement or collection of such stockholders' liability, or any part thereof, until the further order of this court, except that said receiver is authorized out of any such funds to pay, first the current expenses incident to the creation or administration of this trust, including the compensation of such attorneys, agents, and employees as he may employ to aid him in administering the said trust and enforcing the said assessments and stockholders' liability.

It is further ordered that said receiver shall within twenty days from the date of this order file with this Court a bond in the penal sum of $5,000 with one or more sureties to be approved by this Court, conditioned for the faithful performance of his duties as such receiver, and for duly accounting and paying over the moneys that may come into his hands as such receiver, this Court hereby reserving the right to increase the amount of said bond from time to time, as may be deemed by the Court expedient.

It is further ordered that said receiver shall from time to time file a report of his doings as such receiver with this Court, and the Court reserves the right to make such further orders and directions to said receiver at any time as in the opinion of the Court may be proper or necessary.

Dated Aug. 16, 1901.

By the Court,

F. M. CROSBY,
District Judge.

Endorsed: 6409. Original. District Court, Washington County. Merchants' National Bank of St. Paul *v.* Minnesota Thresher Manufacturing Company. Order appointing receiver. Davis, Kellogg and Severance, attorneys for plaintiff. Merchants' National Bank Building, St. Paul, Minn. Filed Aug. 17, 1901. A. K. Doe, clerk.

86 *Fourteenth.* The plaintiff gave bond as such receiver, which bond was approved by one of the judges of said Court and filed in said action; and the plaintiff qualified and entered upon the performance of his duties as such receiver, and ever since has acted, and now is acting, as such.

Fifteenth. On the third day of September, 1901, said District Court made and entered an order with regard to the proof of claims against said company as follows:

STATE OF MINNESOTA, *County of Washington:*

District Court, First Judicial District.

* * * * * * *

MERCHANTS' NATIONAL BANK OF ST. PAUL, MINN., Plaintiff,

v.

MINNESOTA THRESHER MANUFACTURING COMPANY, Defendant.

* * * * * * *

Upon reading and filing the petition of Theodore R. Converse, receiver of the above named defendant, praying that a time be fixed within which the creditors of said defendant shall be required to appear, exhibit their claims, and become parties to this action, and upon duly considering the said matter,

It is ordered, That the term of six months from and after the first publication of this order is limited and fixed as the time within which the creditors of said defendant shall appear, exhibit their claims, and become parties to the said action, and, in default thereof, it is ordered that any creditor failing to appear as aforesaid shall be precluded from the benefit of the judgment which shall be rendered in this action and from any distribution which shall be made under said judgment

It is ordered that notice of this order shall be given by publishing said order once in each week for three successive weeks in the Stillwater "Daily Gazette," a daily newspaper printed and published at the city of Stillwater, said county and State; and it is further ordered

87 that a copy of this order shall be mailed by the said receiver, postage prepaid, addressed to the creditors of said corporation at their places of residence so far as the same may be known to said receiver, within ten days from this date.

Dated Sept. 3, 1901.

F. M. CROSBY,
District Judge.

Endorsed: 6409. Original. District Court, Washington County. Merchants' National Bank *v.* Minnesota Thresher Manufacturing Company. Order requiring creditors to intervene. Filed Sept. 3, 1901. A. K. Doe, clerk.

After the entry of said order, it was published as required therein, and within the time therein limited, and in the manner therein prescribed, the first publication being made September 13, 1901, but was not otherwise served upon the defendants and no actual notice thereof was received by them, and certain creditors of said Thresher Company became parties to said action as intervenors therein, and exhibited therein their claims and demands against said Thresher Company, and proved the same, and after hearing had in said action said claims of such creditors were allowed and proved to the amount of four hundred forty-three thousand seven hundred and fifty-two dollars and seventeen cents ($443,752.17), which included interest to Dec. 11, 1902.

That said indebtedness, except certain items which had been added from time to time for interest, was incurred prior to the year 1899, and is largely represented by notes, which were renewed from time to time; that the claim of the estate of Henry D. Hyde, which was allowed and proved for $139,883.15, was incurred, except certain amounts for interest, long prior to the year 1899, but did not become an obligation to the estate of Henry D. Hyde until subsequent to the year 1899, when the notes which represented this indebtedness, and which were endorsed and guaranteed by the late Henry D. Hyde, were paid by his executors.

Sixteenth. On the sixteenth day of April, 1902, said receiver filed in said district court the following petition for an assessment upon the parties liable as stockholders of the Minnesota Thresher Manufacturing Company:

88 STATE OF MINNESOTA, *County of Washington:*

District Court, First Judicial District.

* * * * * * *

MERCHANTS' NATIONAL BANK OF ST. PAUL, MINN., Plaintiff,

v.

MINNESOTA THRESHER MANUFACTURING COMPANY, Defendant.

Petition.

* * * * * * *

And now comes Theodore R. Converse, receiver of the above named defendant, and respectfully represents to this honorable court and states that heretofore, to wit, on the sixteenth day of August, 1901, this petitioner was, in the above entitled cause, appointed receiver of all the property, estates, rights, and interests of the above named defendant, of every sort or nature, either in law or in equity, and with full authority and directions to sue for, collect, recover, compromise, and settle, any and all stockholders' liability that may

exist under the constitution and laws of the State of Minnesota or otherwise, and to prosecute and sue for the amount of such liability or any assessment that may be made by this Court on account thereof, for the satisfaction of the claims of the creditors of said defendant, and of the expenses of the administration of his said trust, including the fees, allowances and expenses of said receiver and his counsel, with full power and authority to sue for and enforce the collection of any assessments or stockholders' liability either in the courts of the State of Minnesota or the courts of any other State or territory, or the courts of the United States sitting in any State or territory of the United States, and with full power and authority to prosecute appeals or sue out writs of error in any such suits or cases that may be so instituted by said receiver for the collection of such assessments and stockholders' liability, and in general to do and perform all acts that in the opinion of said receiver or that he may be advised are needful or proper for the enforcement and collection of such assessments and stockholders' liability in any of the courts of the United States or of the various States and territories of the United States, and in addition thereto your petitioner as such receiver was by the order and decree of this Court vested with all the usual and ordinary powers of receivers in equity, and was directed to seize and
89 take into his possession, sue for and recover any and all property of every sort and nature possessed by said corporation.

Second. Your petitioner further shows that this action was instituted by the plaintiff as a judgment creditor of said defendant, under the provisions of chapter 76 of the General Statutes of the State of Minnesota for the year 1894, and amendments thereto, that said plaintiff duly recovered on the sixth day of May, 1901, in the district court for Ramsey Co., Minn., a judgment for the sum of $2,938.07, which said judgment was duly docketed in said Court on said day, and was also docketed in this Court.

That an execution directed to the sheriff of said Ramsey Co. was duly issued and delivered to the said sheriff, who made return thereon, that after diligent search and inquiry he was unable to find any property of the defendant in his said county, and hence returned said execution wholly unsatisfied.

That a certain other execution was duly issued out of said Court upon said judgment, directed to the sheriff of said county of Washington, and that said sheriff duly returned that after diligent search and inquiry he was unable to find any property of said defendant in his said county, and hence returned said execution wholly unsatisfied.

That after the issuance and return of said two executions, the above entitled cause was commenced in this Court, and after the commencement of said cause your petitioner, as hereinbefore stated, was duly appointed by this Court as such receiver, with the powers hereinbefore enumerated.

Third. Your petitioner further avers that on the fifth day of January, 1888, said defendant made, executed, and delivered to the Massachusetts Loan and Trust Company, a corporation organized and existing under and by virtue of the laws of the State of Massa-

chusetts and having authority to act as trustee of mortgage indentures, a certain mortgage or deed of trust, wherein and whereby the said defendant sold, assigned, transferred, set over, mortgaged, and conveyed unto the said trust company all its real estate, appurtenances, leasehold interests, buildings, machinery, tools, patterns, fixtures, materials, articles manufactured, unmanufactured or in process of manufacture, stocks of other companies and corporations, cash in hand, book accounts, letters patent, choses in action, bills receivable, chattels real and personal, and all other assets, property, estates, rights, claims, and demands of every name and na-
90 ture either in law or in equity and wherever situated, and also all lands, estates, both real and personal property, assets, chattels real and personal, goods manufactured, unmanufactured, or in process of manufacture, buildings, machinery, tools, patterns, fixtures, materials, cash, book accounts, letters patent, choses in action, bills receivable, and all other claims, rights, or demands of whatsoever name or nature, or wherever situated, either in law or in equity, which might thereafter come into the possession or control of said defendant company, or to which said company might become entitled, the intent of said mortgage, as therein expressed, being that said mortgage or deed of trust should also cover and convey the property of said defendant acquired in the future after the execution and delivery of said mortgage, as well as all property then owned, so long as any of the bonds secured by said mortgage are outstanding and uncollected.

And your petitioner avers that the said mortgage or deed of trust was made to secure an issue of 1,600 bonds of $1,600 each, dated Jan. 2, 1888, and due Jan. 1, 1908, with interest at the rate of five per cent. per annum, payable semi-annually on the first days of January and July of each year at the office of the said Massachusetts Loan and Trust Company in Boston, Mass.; and that said bonds were at once certified by the trustee, issued and sold to divers and sundry persons, and except as a portion of the same were thereafter retired as hereinafter mentioned, the same continued to be secured by said mortgage above set forth.

That said mortgage or deed of trust was recorded in the office of the register of deeds of the county of Washington, State of Minnesota, on the fifth day of January, 1888, in Book "Z" of Mortgages, pages 436 *et seq.*, and was also filed at the same time in the office of the clerk of the city of Stillwater, where the personal property covered by the same was situated.

That after the execution and negotiation of said bonds and the execution, delivery, and recording of said mortgage, divers and supplemental mortgages were made from time to time by the said defendant to said Massachusetts Loan and Trust Company, covering all of its property owned at the time of the execution of the same, or thereafter to be acquired by said defendant, all of said supplementary mortgages being made likewise to secure the payment of said issue of mortgage bonds above set forth.

That from time to time the said defendant paid off and re-
91 tired certain of said mortgage bonds, to wit, eleven hundred and eight of the same, leaving outstanding and unpaid four hundred and ninety-two of said bonds of the par value of $492,000.

That it being claimed that default was made in the conditions of said mortgages, said Massachusetts Loan and Trust Company did on the fourteenth day of December, 1900, file in the office of the United States Circuit Court for the district of Minnesota, third division, its certain foreclosure bill, in which bill of complaint there was duly set forth the making and delivery of said mortgage and the bonds secured by the same, and also the making and delivery of the said supplementary mortgages, and it was prayed in said bill of complaint, among other things, that the mortgaged property, including all the property, real, personal, and mixed, as hereinbefore described, might be sold under the orders and decree of said Court for the satisfaction of the amount due upon said bonds, and on said fourteenth day of December, 1900, after the filing of said bill of complaint and the commencement of such foreclosure suit, such proceedings were duly had, that a receiver was appointed of all the property of said defendant, which receiver accepted his said trust and entered into possession of all of the said property of every sort and nature, and continued in the possession thereof until the sale of said property under foreclosure, as hereinafter set forth.

That thereafter and on the tenth day of April, 1901, such proceedings were duly had in said cause so pending in said United States Circuit Court, that a decree of foreclosure was duly entered therein, wherein it was adjudged and decreed that the defendant, Minnesota Thresher Manufacturing Company, pay or cause to be paid on or before April 15, 1901, to Howard S. Abbott, as special master appointed in and by said decree, for the benefit of said Massachusetts Loan and Trust Company, the complainant in said cause, the sum of $492,000 together with interest thereon at five per cent. per annum from July 1, 1900, and that in default of such payment all the said property and premises described in said foreclosure decree and owned by defendant should be sold at public auction.

That in and by said foreclosure decree it was, among other things, adjudged and decreed that all of the property of the said defendant, real, personal and mixed, including accounts receivable, bills receivable, and all other choses in action, claims and demands of every sort or nature, were covered by the lien of said mortgages, and in case of such default in the payment of said sum
92 within the time limited by said decree, it was ordered, adjudged and decreed that the same and the whole thereof be sold at public auction for the satisfaction of said mortgage indebtedness, and that said sale of such property be made as an entirety in one lot and parcel without redemption.

That neither the said defendant nor any other person paid or caused to be paid the said sum of $492,000 and interest, or any part thereof, either on or before said April 15, 1901, or at any other

time, and that in consequence thereof and under and in accordance with the provision of said decree, said special master fixed as the time and place of said sale the eighteenth day of May, 1901, at the hour of twelve o'clock noon at the front door of the county court house of the county of Washington, in the city of Stillwater and State of Minnesota, and that the notice of such sale was given by said master as provided in said decree.

That on said date the said sale was adjourned until the twenty-fifth day of May, 1901, at which time all of the said property was, as provided in said decree, duly offered for sale, struck off, and sold for the sum of $125,000, and such proceedings were thereafter had that the said sale was by said United States Circuit Court, duly confirmed, and after such confirmation deeds of conveyances were made by said special master, and said Massachusetts Loan and Trust Company, trustee under said mortgages, and the defendant, Minnesota Thresher Manufacturing Company, as provided in said decree, which said deeds were delivered to the purchaser at said foreclosure sale, and said purchaser took possession of the property and the whole thereof.

Fourth. That by reason of the said mortgages and the foreclosure thereof, and the said sale and conveyance of all the said property of said defendant, the said defendant is wholly without assets or property of any sort or nature out of which the claims of the creditors of the said defendant or any part of such claims can be paid, collected or realized.

Fifth. That after the appointment of your petitioner as such receiver, he duly made his petition to this Court, praying, among other things, that an order be made fixing a time within which the creditors of the defendant should be required to appear, exhibit their claims, and become parties to this cause, or be precluded from the benefit of the judgment which will be rendered in this action, and from any distribution which may be made under said judgment.

That upon said petition this Court made its order on the
93 third day of September, 1901, in and by which, among other things, it was ordered that the term of six months from and after the first publication of such order was limited and fixed as the time within which the creditors of defendant should appear, exhibit their claims, and become parties to this action, and in default thereof it was ordered that any creditor failing to appear as aforesaid should be precluded from the benefit of the judgment which will be rendered in this action, and from any distribution which shall be made under said judgment; and it was further ordered that notice of said order should be given by publishing said order once in each week for three successive weeks in the Stillwater "Daily Gazette," a daily newspaper printed and published at the city of Stillwater, said county and State, and that a copy of said order be mailed by your petitioner as receiver, postage prepaid, addressed to the creditors of said corporation at their place of residence, so far as the same may be known to said receiver, within ten days from said date.

That your petitioner duly caused said order to be published, as provided therein, and did within the time limited by said order mail to the creditors of said defendant, so far as known to him, at their respective post-office addresses, postage prepaid, copies of said order.

That, pursuant to the said notice, certain of the creditors of said defendant, whose claims aggregate $381,725.79 and interest, have filed their complaints of intervention herein.

That a list of the said creditors who have so intervened, together with the amounts of their several claims, and the date from which interest is due thereon, is hereto attached marked "Exhibit B," and made a part of this petition. Said interest is to be paid at the rate of six per cent. per annum.

That the date fixed by said order for creditors to intervene is now passed, and that no other creditors have signified their intention of applying to this Court for leave to intervene, with the exception of the First National Bank of Oxford, N. Y., a creditor of said defendant, which said creditor has appeared in said matter, and has asked to have until the fifteenth day of April, 1902, in which to file a complaint of intervention.

That your petitioner has made a careful investigation of the indebtedness of said defendant, and has ascertained that in addition to the claims of such creditors who so intervened, the said defendant is indebted in the sum of $23,679.15 and interest,
94 that said sum includes the claim of said First National Bank of Oxford, N. Y.

That hereto attached marked "Exhibit C," and made a part hereof, is a list of the said creditors who have not intervened in said cause, together with the amounts of their respective claims and the dates from which interest is to be computed on the same, which said interest should also be computed at the rate of six per cent. per annum.

And your petitioner avers that the said two lists, "Exhibits B and C," include all the claims and demands against the said defendant corporation, and truthfully represent and show all of the indebtedness of said corporation outside of the balance of the mortgage indebtedness of said corporation, for the recovery of which, however, no action can be maintained against the stockholders of said defendant by reason of the provisions of the bonds representing such mortgage indebtedness, as your petitioner is advised.

Sixth. Your petitioner further avers that the defendant corporation was organized under and pursuant to the constitution and laws of the State of Minnesota, and under said constitution and laws the stockholders of said corporation are liable to your petitioner as such receiver, to an amount not exceeding the par or face value of the stock held by said stockholders respectively, for the satisfaction of the claims of the creditors of said defendant corporation.

That your petitioner has examined the stock books of the said defendant and the other records of said defendant, and from the same has ascertained that said defendant corporation has issued stock of two classes, denominated "Preferred Stock" and "Common

Stock;" that each of said classes of stock is divided into shares of the par value of $50.00 each.

That of such preferred stock there have been issued and are now outstanding 27,967 shares.

That of the common stock of said corporation there have been issued and are now outstanding 42,594 shares.

That certain of the stock, both preferred and common, has from time to time since the organization of said defendant corporation been transferred.

That certain of the stock is held in the names of trustees, and your petitioner has investigated as to the beneficiaries under such trusts;

95 your petitioner has ascertained the names of the parties for whom said stock was originally held by said trustees, and for whom it is still held so far as the records of said trusts are concerned, but as to any transfers that may have been made or attempted to be made by said beneficiaries, your petitioner has no information sufficient to form a belief.

Your petitioner further avers that lists of the stockholders of said defendant, with the number of shares standing in the names of said stockholders respectively on the records of the defendant corporation, are attached to the complaint herein, but that since the said stock was so obtained by said parties certain of said stockholders have died, and said stock is now owned by their heirs and representatives.

That your petitioner shortly after his appointment commenced a thorough investigation as to the stockholders of said defendant, and as to their solvency and ability to respond to such assessment as this Court may order.

That owing to the great number of said stockholders and the fact that they are scattered through many States, it has been necessary for your petitioner to employ a number of people to conduct these examinations and to ascertain as to the probable solvency of the heirs of deceased stockholders, as well as of the stockholders who are of record and who are still living; that owing to the great number of such stockholders it is impossible to set forth in detail the situation as to each of the same in a petition, but your petitioner avers that upon the hearing of the application for an assessment herein your petitioner will lay before the Court very full and detailed information as to such stockholders and their ability to pay such assessment as may be ordered by the Court.

That of the said stockholders of record who are still living and heirs of deceased stockholders, the investigations made by your petitioner up to this date show that the holders of 18,801 shares of preferred stock and 9,877 shares of the common stock are probably good and able to respond to such assessment as this Court may levy for the satisfaction of the claims of creditors.

That in addition to the stock included in said amounts there are 3,548 shares of common stock included in certain stock standing in the name of trustees, the beneficial holders of which your pe-

titioner believes to be good, provided there have been no transfers of such beneficial interest which would excuse the original beneficial holders thereof from liability.

That certain of the holders of the balance of the stock of
96 said defendant not included in the amounts above stated might possibly be able to respond to assessments, but the bulk of the balance of the same is held by persons who are financially irresponsible.

That of the stockholders regarded by your petitioner as good, there are certain stockholders whose holdings are very small and who live in remote parts of the country, so that the expense of collecting the stockholders' liability would be so great as practically to eat up the assessment; that a few of such stockholders live in States where the judicial decisions are unfavorable to the collection of stock liability, but in the opinion of your petitioner the holders of nearly all of the stock herein classified as good can be made to respond to any assessment that may be made by this Court.

Your petitioner further avers that only a small portion of the stock held by responsible stockholders is owned in the State of Minnesota; the greater part of the same is owned in New England, particularly in the State of Massachusetts.

Your petitioner further avers that he has already incurred a very considerable expense in conducting the examination necessary to properly advise this Court as to the situation regarding said stockholders and their solvency, and that it is impossible at the present time to determine the expense of administering this trust and collecting the liability of the stockholders for the benefit of the creditors herein, but your petitioner avers that owing to the fact that legal proceedings will have to be instituted in many different States and in many different counties of different States and against so large a number of stockholders, and in view of the fact that the amount involved in such litigation is large and the responsibility of the same is great, that in considering the amount for which assessment should be levied a very considerable sum must necessarily be added for the expense of collection and administration.

For the reasons hereinbefore set forth, and inasmuch as there is no property whatsoever of any kind or nature of said defendant from which said claims and demands against the defendant can be made, except from such stockholders' assessments, your petitioner prays that for the purpose of providing funds for the payment of the expenses of this receivership in the enforcement of such stock liability, and for the payment of the indebtedness of said defendant, as the same may be proved and allowed in this action and proceeding, this
97 Court, by its order herein, may direct and levy a ratable assessment upon all parties liable as stockholders of said corporation, or upon or on account of any shares of stock of said corporation for such amount, proportion, or percentage of the liability for or on account of each share of stock, as the Court shall deem proper after hearing, as by law provided, and to that end your petitioner prays that this Court, by its order, may appoint a time for hearing this petition and the application herein contained, and direct

such notice of such hearing to be given as to the Court may seem proper.

THEODORE R. CONVERSE, *Petitioner.*

DAVIS, KELLOGG & SEVERANCE,
Attorney- for Receiver.

STATE OF MINNESOTA, *County of Ramsey, ss:*

Theodore R. Converse came before me personally, and being duly sworn, doth say that he is the petitioner in the above entitled action; that the foregoing pleading is true of his own knowledge, except as to those matters which are therein stated on his information and belief, and as to those matters that he believes it to be true.

THEODORE R. CONVERSE.

Subscribed and sworn to before me on this 16th day of April, A. D. 1902.

[NOTARIAL SEAL.] C. W. G. WITHEE,
Notary Public, Ramsey Co., Minn.

Endorsed: 6409. Original. District Court, Washington County. Merchants National Bank of St. Paul, Minn., *v.* Minnesota Thresher Manufacturing Company. Petition of Theo. R. Converse. Filed April 16, 1902. A. K. Doe, clerk.

Seventeenth. The number of shares of preferred stock that had been issued, and were outstanding, at the time of said petition for the assessment, was 27,967 shares, and the number of shares of common stock that had been issued and were outstanding at the same time, was 42,594, making a total number of shares outstanding at the time the petition for the assessment was filed of 70,561.

98 *Eighteenth.* On the twenty-second day of December, 1902, the Court made the following order of assessment upon said petition of the receiver, and in making said order the Court included as a basis of the assessment the expenses stated in the petition for the assessment.

STATE OF MINNESOTA, *County of Washington:*

District Court, First Judicial District.

* * * * * * *

MERCHANTS NATIONAL BANK OF ST. PAUL, MINN. (a Corporation), Plaintiff,

v.

MINNESOTA THRESHER MANUFACTURING COMPANY (a Corporation), Defendant.

* * * * * * *

Order.

This matter having come on to be heard at a special term of this Court, held at the court house, in the city of Stillwater, in said county

and State, on Tuesday, the tenth day of June, 1902, at ten o'clock in the forenoon, pursuant to an order made and entered herein on the sixteenth day of April, 1902, upon the petition of Theodore R. Converse, receiver of the said defendant corporation, which petition was duly filed with the clerk of this Court, praying among other things that this Court might by order herein direct and levy a ratable assessment upon the parties liable as stockholders of said defendant corporation, for such amount, proportion, or percentage of the liability for or on account of each share of said stock, as the Court should deem proper after hearing as by law provided, pursuant to the provisions of chapter 272 of the General Laws of Minnesota for the year 1899; and said receiver having duly appeared at said special term of court on the said tenth day of June, 1902, in support of said petition of said receiver, by Messrs. Davis, Kellogg & Severance, his attorneys; and Messrs. Koon, Whelan & Bennett, Charles P. Searle, and J. H. Benton, Jr., having appeared in opposition thereto on behalf of the following named stockholders of said defendant, to wit:

D. N. Morgan, of Bridgeport, Conn.; George E. Carter, of Boston, Mass.; Dime Savings Bank, of Norwich, Conn.; Hingham National Bank, of Hingham, Mass.; Mechanics National Bank, of Worcester, Mass.; Great Falls National Bank, of Great Falls, N. H.;
99 Naumkeag National Bank, of Salem, Mass.; Home National Bank, of Brockton, Mass., and the Second National Bank of Bangor, Me., and said counsel for objecting stockholders having filed a written objection and answer to the said petition, to which a reply was duly filed by the counsel for said receiver; and it appearing to the satisfaction of the Court that copies of said order dated April 16, 1902, were duly published, mailed, and served in the manner herein prescribed, and that due notice of said hearing was duly given by said receiver to the defendant and to each stockholder of record of the defendant, as directed by said order; and the said matter having been adjourned from time to time, and having come on for final hearing on Wednesday, the tenth day of December, 1902, at which time evidence was introduced by the receiver and by said objecting stockholders, and the said matter having been orally argued to this Court by M. B. Koon, Esq., one of the counsel for said objecting stockholders, on behalf of said stockholders, and by C. A. Severance, Esq., one of the attorneys for said receiver, on behalf of said receiver; and it appearing to the satisfaction of the Court after hearing and considering the proofs and evidence introduced at said hearing by and in behalf of said parties respectively and the arguments of counsel, that it is necessary and proper that an assessment of eighteen dollars ($18.00) on each share of capital stock of said corporation be directed and levied herein against all parties liable as stockholders of said defendant.

Now, therefore, It is ordered: That an assessment of thirty-six per cent. (36%) of the par value of each share of the capital stock of said defendant, to wit: the sum of eighteen dollars ($18.00) on each share thereof be and the same is hereby assessed upon and against each and every share of said capital stock, and upon and against the person, corporation, or party liable as a stockholder of

defendant for, upon, or on account of such shares of stock, and that each and every person, corporation, or party liable as such stockholder of said defendant be, and he is hereby directed to pay to Theodore R. Converse, receiver of said defendant, at his office in the city of Stillwater, county of Washington, in said State of Minnesota, within thirty (30) days after the date of this order, the said sum of eighteen dollars ($18.00) for and on account of each and every share of said stock for or upon which said person, corporation, or party is liable as a stockholder of said defendant as aforesaid;

Ordered further, That said receiver forthwith proceed to
100 collect the several amounts due from the several persons, corporations, and parties liable as stockholders of said defendant under the terms of this order, and hold the amount thus collected subject to the further order of this Court herein;

Ordered further: That in case any person, corporation or party liable as a stockholder of said defendant shall fail to pay the amount hereby assessed against the share or shares of stock held or owned by such stockholder, or upon or on account of which he or it may be liable within the time hereinbefore specified, said receiver is hereby directed and authorized to forthwith institute and prosecute such action or actions or other proceedings against such person, persons, corporation or party liable in any court having jurisdiction, whether in this State or elsewhere which said receiver may deem necessary or proper for the recovery of the amount due from such person, persons, corporation or party under the terms of this order;

Ordered further: That said receiver give due notice of this order by mailing a copy of the same within ten days from the date hereof, to each stockholder of said defendant whose name and address is known to said receiver.

By the Court,

W. C. WILLISTON,
District Judge.

Dated Dec. 22, 1902.

Endorsed: 6409. Original. District Court, Washington County. Merchants National Bank of St. Paul, Minn., *v.* Minnesota Thresher Manufacturing Company. Order of assessment upon stockholders. Davis, Kellogg & Severance, attorneys for receiver, Merchants National Bank Building, St. Paul, Minn. Filed Dec. 23, 1903. A. K. Doe, clerk.

Nineteenth. Notice of said last-mentioned order of said District Court of said Washington County was given by this plaintiff as such receiver, as prescribed by said order, and in the manner directed thereby. Certain stockholders of said Thresher Company, other than the defendants, intervened in said last-mentioned action and objected to the issuance of said last-mentioned order and the levy of any assessment, and duly prosecuted an appeal from said last-mentioned order to the Supreme Court of said State of Minnesota. Said appeal was heard and considered by said Supreme Court; and at the

April term, A. D. 1903, of said Court, judgment was rendered
101 and entered in said matter in and by said Supreme Court, determining and adjudging that the said order so appealed from be in all things affirmed. The copy of said opinion is as follows:

13479.

STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1903.

No. 123.

In re Receivership of the Minnesota Thresher Manufacturing Company, THEODORE R. CONVERSE, Receiver of the Minnesota Thresher Manufacturing Company, Respondent,

v.

D. N. MORGAN ET AL., Appellants.

Syllabus.

1. The articles of an alleged manufacturing corporation are the sole criterion for determining the intention of the incorporators and the purposes for which the corporation was organized; and unless it fairly appears therefrom that it was organized for the exclusive purpose of engaging in manufacturing and such incidental business as may be reasonably necessary for effectuating the purpose of its organization, its stockholders are liable for its debts to the amount of stock held by them.
2. Rule applied, and held that the stockholders of the defendant corporation are so liable for its debts.

Order affirmed.

102 1379.

STATE OF MINNESOTA:

Supreme Court, April Term, A. D., 1903.

No. 123.

In re Receivership of the Minnesota Thresher Manufacturing Company, THEODORE R. CONVERSE, Receiver of the Minnesota Thresher Manufacturing Company, Respondent,

v.

D. N. MORGAN ET AL., Appellants.

Opinion.

This action was commenced in the District Court of the county of Washington by the plaintiff, a judgment creditor of the defendant,

an insolvent corporation, under the provisions of G. S., 1894, c. 76, and a receiver was duly appointed herein. The receiver duly made and filed his petition praying the Court to order, direct, and levy a ratable assessment upon the parties liable as stockholders of the defendant pursuant to the provisions of Laws, 1899, c. 272. The Court, after a hearing on the petition, and on Dec. 23, 1902, made its order assessing each share of the capital stock of the defendant for the sum of $18, and certain of the stockholders appealed from the order. The sole question presented for our consideration and decision is whether the stockholders of the defendant are liable for its debts to the amount of stock held or owned by them as provided by Art. 10, sect. 3, of our State Constitution. Or, in other words, is the defendant a corporation organized for the purpose of carrying on any kind of manufacturing or mechanical business within the meaning of the constitutional provision referred to? The answer to the question depends upon the construction to be given to the articles of association of the defendant, which, so far as here material, are in these words: "The objects for which this corporation is formed are the purchase of the capital stock, evidences of indebtedness issued by it, and the assets of the Northwestern Manufacturing and Car Company, a corporation existing under the laws of the State of Minnesota, or any portion of said capital stock, evidences of indebtedness or assets, and the manufacture and sale of steam engines
of all kinds, farm implements, and machinery of all kinds,
103 and the manufacture and sale of all articles, implements, and
machinery of which wood and iron, or either of them, form the principal component parts, and the manufacture of the materials therein used."

It is manifest from this language that the defendant was not organized for the purpose of carrying on any mechanical business; hence the question is whether it is a manufacturing corporation within the meaning of the constitution. It is important before analyzing the articles of incorporation to determine the rule by which they are to be construed. The rule is to be deduced from the constitutional provision imposing the liability of stockholders for the debts of their corporation, the statute as to the organizing of manufacturing corporations, and the decisions of this Court construing them. The constitution provides that: "Each stockholder in any corporation (excepting those organized for the purpose of carrying on any kind of manufacturing or mechanical business) shall be liable to the amount of stock held or owned by him."

Art. 10, Sect. 3.

And the statute as to the statement of the purposes for which a manufacturing corporation is organized in its articles requires that: "The purpose for which every such corporation shall be established shall be distinctly and definitely specified by the stockholders in their articles of association, and it shall not be lawful for said corporation to direct its operations or appropriate its funds to any other purpose."

G. S., 1894, Sect. 2807.

It is obvious from these provisions that the liability of stockholders for the debts of the corporation is the general rule and their non-liability therefor the exception, and that to bring them within the exception the purpose for which the corporation is organized must be so definitely stated in the articles of association as to fairly show upon their face that the corporation was organized only for the purpose of engaging in the business of manufacturing. And, further, that the actual intention of the incorporators, except so far as it appears on the face of their articles, must be immaterial, for creditors proposing to give credit to the corporation have no other means of determining such intention and whether or not the stockholders are liable for its debts. These premises have been uniformly accepted as correct by this Court in all of its decisions relating to the liability of stockholders for the debts of their corporation. And basing our conclusion upon such decisions we hold that the rule in such cases, by which the articles of incorporation are to be construed, is this: It is immaterial that the corporation was organized under the statute providing for organizing manufacturing corporations, or what the actual intention of the incorporators was, or that the corporation, in fact, carried on only a manufacturing business; but its articles of incorporation are the sole criterion as to such intention and the purposes for which the corporation was organized, and unless it fairly appears therefrom that it was organized for the exclusive purpose of engaging in manufacturing and such incidental business as may be reasonably necessary for effectuating the purpose of its organization, its stockholders are not within the exception to the general rule of constitutional liability of stockholders for the debts of their corporation.

104

State *v.* Thresher Co., 40 Minn. 213.
Mohr *v.* Elevator Co., 40 Minn. 343.
Arthur *v.* Willius, 44 Minn. 409.
Densmore *v.* Shepherd, 46 Minn. 54.
First Nat. Bank of Winona *v.* Plow Co., 58 Minn. 167.
Oswald *v.* Publishing Co., 60 Minn. 82.
St. Paul Barrel Co. *v.* Distilling Co., 62 Minn. 148.
Hastings Malt Co. *v.* Brewing Co., 65 Minn. 28.
Anderson *v.* Iron Co., 65 Minn. 281.
Commercial Bank *v.* Azotine Co., 66 Minn. 413.
Nicollet Bank *v.* Fish-Iver Co., 71 Minn. 413.
Minn. Title Ins. & Trust Co. *v.* Regan, 72 Minn. 431.
Cuyler *v.* City Power Co., 74 Minn. 22.
Gould *v.* Fuller, 79 Minn. 414.
Scnour Mfg. Co. *v.* Church Paint Co., 81 Minn. 294.
Craig *v.* Sisters' Hospital, 93 N. W. Rep. 669.

It is, however, the contention of counsel for the appellants, if we correctly understand their claim, that the later decisions of this Court have modified the rule we have stated to the effect that in construing the articles of incorporation the conditions and circumstances under which the language thereof was used by the incorpo-

rators should be looked into for the purpose of ascertaining the intention of the persons using it.

The cases relied upon in support of this claim are Senour
105 Manufacturing Company *v.* Church Paint Company *supra,* and Cuyler *v.* City Power Company, *supra.* In the last case there is no hint of any modification of the rule or that reference may be had to any matters outside the articles of incorporation to arrive at the intention of the incorporators when adopting the charter. On the contrary, it was held on the face of the articles, putting aside all technicalities, that it clearly appeared therefrom that the only business for which the corporation was organized was to produce and create motive power for transmission and use as might be desirable for any legitimate purpose. The only plausible support to be found in the first case for the claim of counsel is the statement in the opinion that: "The intention of the incorporators must control in construing its language. The same rule must be applied as is applied in the construction and interpretation of contracts and other writings." It is manifest, however, from the opinion, that it does not hold that the intention of the incorporators may be ascertained by a reference to any matters not appearing on the face of the articles, for it is expressly held that they are the *sole* criterion as to the purposes for which the corporation was formed, that is, for ascertaining the intention of the associates. Now, taking the articles in question by the four corners and reading them in the light of the rule we have stated, without resorting to technicalities, does it fairly appear therefrom that the corporation was organized for *the exclusive purpose* of engaging in manufacturing and business incidental thereto and reasonably necessary for carrying into effect such purpose? We answer the question in the negative. There are two general purposes for which the corporation was organized as declared by the articles. One, the purchase of the capital stock, evidence of indebtedness and assets of an existing corporation; and the other the manufacture and sale of all articles, implements, and machinery, made of wood and iron, or either of them, and the manufacture of the materials therein used. The first purpose does not appear to be a necessary incident to the second one. On the contrary, the corporation was authorized to buy and sell the stock, choses in action and assets of the Northwestern Manufacturing and Car Company, mentioned in the articles, without ever engaging in the business of manufacturing. The first purpose appears to be independent of the second one, for the power to buy necessarily includes the incidental power to use, collect, deal with, or sell the stock and assets of the then existing corporation. Nor does it fairly appear, expressly or
106 by necessary implication, from the language of these articles, that such stock and assets were to be purchased only as a necessary incident to the declared purpose of manufacturing all articles which are made of wood or iron, or either of them. We have proceeded thus far as if the question whether the defendant corporation was organized for the sole purpose of carrying on an exclusive manufacturing business was an open one, and have reached the conclusion on the merits that it was not. A majority of the Court,

however, are of the opinion that the question is not an open one, for the reason that the identical articles of incorporation here under consideration were construed in the case of State *v.* Thresher Co. (the defendant here), 40 Minn. 213, and it was decided by the Court that the defendant was not such a corporation. It is urged on behalf of appellants that such decision was not in response to any issues in the case, hence all that is said in the opinion as to whether the defendant was organized for the sole purpose of carrying on an exclusive manufacturing business was obiter. We are of the opinion that it was not. The case referred to was one to forfeit the franchise of the defendant as a corporation because it was carrying on a business not authorized by its charter, that is, buying and dealing in the stock, evidence of indebtedness and assets of the car company. It is true that the State alleged and the defendant admitted that it was a manufacturing corporation, but its articles of incorporation were a part of the pleadings. Hence the first question before the Court was what kind of a corporation the defendant was—a question necessary to be determined, for whether the defendant had misused its corporate franchises depended largely upon the answer to be given to the question. And the Court laid down the rule for the construction of the articles of incorporation, construed them in accordance therewith, and held that the defendant was not a manufacturing corporation, but belonged to the class authorized by G. S., 1894, c. 34, title 2.

It follows that the stockholders of the defendant are liable for its debts, and that the order appealed from must be affirmed. So ordered.

START, *C. J.*

Twentieth. The law of Minnesota, as shown by its printed statutes and the printed reports of its Supreme Court, is to be taken as proved as a fact in this case.

Twenty-first. No assignment to the plaintiff as receiver of the claims of any of the creditors of the corporation against its shareholders upon their liability under the constitution and Statutes of Minnesota has ever been made by any of the creditors.

197 "Twenty-second. All certificates of shares of the stock of the Minnesota Thresher Manufacturing Company contained the statement that they were "full paid and non-assessable."

Twenty-third. On January 5, 1888, the Minnesota Manufacturing Company executed and delivered to the Massachusetts Loan & Trust Company, as Trustee, a mortgage of all its real estate, property, assets and franchises, but not purporting to cover the stockholders' personal liabilities, to secure the payment of sixteen hundred bonds of one thousand ($1,000) dollars each. On December 14th, 1900, in an action brought by the Trustee under said mortgage, in the United States Circuit Court for the District of Minnesota, for the foreclosure and sale of the property covered by said mortgage and by certain supplementary mortgages executed by the Minnesota Thresher Manufacturing Company for further assurances, E. D. Buffington was by said court appointed receiver of all the property

covered by said mortgages; said Buffington qualified as receiver, took possession of the said assets and property of the corporation, and carried on the business under the direction of the said court, until the foreclosure sale. Such foreclosure sale of all the property covered by the said mortgage was made on May 25, 1901, under final decree of foreclosure and sale made by the said court, and a conveyance of all of said property was on June 13, 1901, executed and delivered to the purchaser at such sale. Such sale and conveyance was by a decree of said Court confirmed on July 12th, 1901; and on September 4, 1901, the Receiver was discharged and the receiver and his sureties released from obligation on his bond.

Twenty-fourth. This action was commenced on January 28th, 1901.

Twenty-fifth. No action was brought or judgment obtained by any of the creditors of the Minnesota Thresher Manufacturing Company against that company excepting as appears in the record.

108 EXHIBIT "A."

List of Present Preferred Stockholders of Record of Minnesota Thresher Manufacturing Company.

Name.	Residence.	No. shares.
Abington National Bank	Abington, Mass	321
Aetna National Bank	Hartford, Conn	268
Amoskeag Savings Bank	Manchester, N. H	114
Ashcroft Manufacturing Company.	Bridgeport, Conn	30
American Oak Leather Company.	Chicago, Ill	3
Alston Manufacturing Company	Chicago, Ill	28
Blackstone National Bank	Boston, Mass	106
Bristol County National Bank	Taunton, Mass	175
Bay State National Bank	Lawrence, Mass	99
Burnham, H. B.	Epping, N. H	11
Blumpey, Philip H.	Newburyport, Mass	64
Butters, Geo. H.	Fitchburg, Mass.	21
Belknap Savings Bank	Laconia, N. H	53
Bates, Emory L.	Fiskdale, Mass	211
Barron, Arianna A	Concord, N. H	44
Blodgett, John S.	Concord, N. H	64
Bartlett, Benj. L.	East Deering, N. H	23
Barron, John H.	Concord, N. H	21
Boylston National Bank	Boston, Mass.	183
Baker, Oliver K.	West Dennis, Mass.	21
Blue Hill National Bank	Milton, Mass.	207
Barton National Bank	Barton, Vt.	103
Baldwin, O. D.	N. Y. Tribune Building, N. Y. City.	7
Brigham, Chas. L.	Hudson, Mass.	107
Bagg, S. F.	Watertown, N. Y	237
Buffington, E. D	Stillwater, Minn	3
Bourne, Russell	Plymouth, Mass.	106
Brown, W. C.	Freeport, Ill	2
Berry Bros.	Detroit, Mich	2
Besly & Co., Chas. H.	Chicago, Ill	3
Ball & Naylor	Minneapolis, Minn	2
Burd & Little	St. Louis, Mo	2
Barr, G. D.	Buffalo, N. Y	151

Name.	Residence.	No. shares.
Bradley & Vrooman	Chicago, Ill	4
Buckley, Chas. F.	Southport, Conn	20
Barrett, W. T.	Chicago, Ill	88
Breslin, Thos	Waterford, N. Y.	52
Burlingame, C. S.	Danielson, Conn	18
Backus, Chas. P.	Danielson, Conn	18
Bishop, Allie E.	New Braintree, Mass	21
Brennan, James	P. O. Box 484, Minneapolis, Minn.	7
City National Bank	Worcester, Mass.	354
Cushing, L. B	Newburyport, Mass	85
Chamberlain, J. P.	Buffalo, N. Y.	21
Cowles, W. H. H	Randolph, Mass.	33
Carpenter, Chas. H.	North Chichester, N. H.	22
Cutler, Geo. H	Fitchburg, Mass.	37
Cape Cod National Bank	Harwich, Mass.	214
Crowell, Edw. F.	West Dennis, Mass.	43
109 Chapman, Jas. L.	Fitchburg, Mass.	42
Cochechew National Bank	Dover, N. H.	104
Churchill, Elizabeth M	5108 South Broadway, St. Louis, Mo.	50
Cutcheon, F. W. M.	St. Paul, Minn.	4
Curtiss, Andrew R.	Stepney Depot, Conn	20
Carter, Geo. E.	Exchange Building, Boston, Mass	38
Crippen, H. J., Dewey, D. R., and E. B. Buffington, Trustees		192
Carter, Fred G., Adm. Est. of Marion A. Carter.	Lebanon, N. H.	8
Cook, Sarah J.	50 Nassau Street, Fitchburg, Mass.	21
Crosby, Stephen M.	60 State Street, Boston, Mass.	10
Clifford, G. F.	Fitchburg, Mass.	63
Cutler, Mary E.	Fitchburg, Mass.	5
Downing, Amos W.	Haverhill, Mass.	82
Dean, Theo., Est. of, care of C. D. Stickney.	No. 1 Herald Building, Boston, Mass.	286
Dyer, Jos.	South Weymouth, Mass	34
Durgin & Son, J.	Boston, Mass	53
Dime Savings Bank	Norwich, Conn.	206
Damon, Fannie A.	Clinton, Mass	21
Dewey, D. R.	Chicago, Ill	4
Dime Savings Bank (Geo. E. Stiles, Receiver).	Willimantic, Conn	80
Degen, L. P.	San Francisco, Cal.	8
Doyon, Arvilla.	Madison, Wis.	111
Dewey & Buffington, Surviving Trustees.		85
Dix, Elizabeth F.	Lancaster, Mass.	7
Emery, Joseph M	Simcook, N. H.	21
Emerson, Talcott & Co.	Rockford, Ill.	38
Estate of Geo. Stetson	Bangor, Me	52
Endicott, Henry	Boston, Mass.	100
First National Bank	Provincetown, Mass	376
First National Bank	Montpelier, Vt.	307
First National Bank	Chelsea, Vt.	470
First National Bank	Ottawa, Ill.	274
First National Bank	South Weymouth, Mass	114
Farrar, Judson N.	Abington, Mass.	21
Folsom, A. G.	Laconia, N. H.	11
Foster, Wm.	Corning, N. H	21
First National Bank	Bangor, Me	199
Farley, Nathan	New Boston, N. H.	21
Farley, H. Nelson	Concord, N. H	21

Name.	Residence.	No. shares.
Farwell, Elijah C.	Fitchburg, Mass.	12
Forbes, M. A. S.	Clinton, Mass.	21
First National Bank of Killingly as Coll.	Danielson, Conn.	235
Foster, Jas. M.	63 Federal Street, Boston, Mass.	200
First National Bank	Clinton, Mass.	103
Fitchburg Mutual Fire Insurance Company	Fitchburg, Mass.	107
Fiske, J. N.	Boston, Mass.	100
First National Bank	Marlboro, Mass.	102
First National Bank	Suffield, Conn.	53
Farnsworth, Ezra, care of Parker, Wilder & Co.	Boston, Mass.	100
Fogg, J. S., Crippen, H. J., Dewey, D. B., Trustees.		149
First National Bank	Willimantic, Conn.	80
First National Bank	Oxford, N. Y.	43
Freeman & Sons Manufacturing Company, S.	Racine, Wis.	4
First National Bank	Bethlehem, Pa.	202
Frink, Geo. S.	Chicago, Ill.	86
(This stock now held by the Weston Furnace Company, to whom all notices should be sent.)	Manistique, Mich.	
110 French Spring Company, Ltd., The A.	Pittsburg, Pa.	85
Fogle, H. C.	Canton, O.	1
Frothingham, Elizabeth S.	Cambridge, Mass.	50
Farwell, Levi A.	Wiggin, Col.	32
Foote, Louise Stetson nee Louise F. Stetson, Bangor, Me.	Cairo, Egypt	17
Great Falls National Bank	Great Falls, N. H.	200
Giles, Thomas F., Adm. of Est. of Jesse H. Giles.	Abington, Mass.	85
Goodnow, Lyman H.	Fitchburg, Mass.	235
Goodhue, Elizabeth C.	Newburyport Mass., Andover, Mass., or Marion street, Brookline, Mass.	21
Goodrich, Edwin A.	Fitchburg, Mass.	21
Georgetown National Bank	Georgetown, Mass.	54
Gloucester National Bank	Gloucester, Mass.	97
Greenlee Bros. & Co.	227 West 12th Street, Chicago, Ill.	29
Gardner Gov. Co.	Quincy, Ill.	94
Graton, Henry C.	Worcester, Mass.	208
Grosvenor, Ellen G.	Brooklyn, N. Y.	60
Grant Corundum Wheel Company	Springfield, Mass.	2
Gibbs, Mary E.	Detroit, Mich.	107
Grover, Geo. W.	Sheffield, Mass.	21
Goodwin, Mrs. C. A., Box 275 or care of Tremont National Bank.	Lexington, Mass. / Boston, Mass.	20
Hamilton National Bank	Boston, Mass.	108
Hingham National Bank	Hingham, Mass.	103
Home National Bank.	Brockton, Mass.	207
Highland National Bank	Newburg, N. Y.	104
Haverhill National Bank	Haverhill, Mass.	104
Hanscom, Julia M Care of R. W. Nason.	Bridgewater, Mass. / Advertiser Building, Boston, Mass.	21
Hayward, Chas. H.	Fitchburg, Mass.	21
Hayward, Myria J.	Fitchburg, Mass.	21
Hill, Clarke & Co.	No. 36 Oliver Street, Boston, Mass.	16
Hyde, H. D.	Boston, Mass.	3

Name.	Residence.	No. shares.
Hospes, E. L. & Co.	Stillwater, Minn.	7
Hersey & Bean Lumber Company.	Stillwater, Minn.	8
Hueter, E. L.	San Francisco, Cal.	1
Hopkins, D. A.	113 Liberty Street, New York, N. Y.	53
Hoyt, Mary H.	Detroit, Mich.	21
Hamilton, Caroline A.	Sun Prairie, Wis.	21
Herrick, Jeneva S.	Madison, Wis.	111
Hancock National Bank, John.	Springfield, Mass.	103
Johnson, Wm. R.	Newburyport, Mass.	42
Johnson, Caroline E.	Newburyport, Mass.	42
Jersey Shore Banking Company.	Jersey Shore, Pa.	103
Johnson, Mary A. or Chester N.	East Templeton, Mass.	64
Janney, Semple & Co.	Minneapolis, Minn.	3
Jackson, Byron.	625 Sixth Street, San Francisco, Cal.	26
Jones, Asa T.	623 Cascade Avenue, Colorado Springs, Col.	42
Knight, Jos. A.	Worcester, Mass.	188
Kirk, R. A.	St. Paul, Minn.	3
Kirkwood, A. J.	Chicago, Ill.	65
Lawrence National Bank.	Lawrence, Mass.	98
Lord, Chas. S.	Otter River, Mass.	21
Lane, Abigail R.	Lancaster, Mass.	21
Leicester National Bank.	Leicester, Mass.	106
Loan and Trust Savings Bank.	Concord, N. H.	104
111 Lechmere National Bank.	East Cambridge, Mass.	409
Lindeke, Wm.	St. Paul, Minn.	4
Laconia National Bank.	Laconia, N. H.	50
Lawrence, Mary Porter.	Grand Rapids, Mich.	26
Lawrence, John S.	Grand Rapids, Mich.	25
Massachusetts National Bank.	Boston, Mass.	200
Mercantile National Bank.	Salem, Mass.	206
Merchants National Bank.	Newburyport, Mass.	107
Mechanics National Bank.	New Bedford, Mass.	107
Mechanics National Bank.	Worcester, Mass.	214
Mason, Wm. G.	Concord, N. H.	21
Manufacturers National Bank.	Boston, Mass.	105
Merrimack National Bank.	Haverhill, Mass.	103
Marblehead National Bank.	Marblehead, Mass.	206
Merchants National Bank.	Norwich, Conn.	53
Mankato Linseed Oil Company.	Mankato, Minn.	9
Moore Manufacturing Company.	Chicago, Ill.	9
Murphy & Co.	Chicago, Ill.	1
Mears, Lois C.	420 North Carroll Street, Madison, Wis.	42
Mandell, Mrs. Almira W. Care of Tremont National Bank.	North Cambridge, Mass. Boston, Mass.	65
Markley, Alling & Co.	Chicago, Ill.	1
Morgan, D. N.	Bridgeport, Conn.	20
Morse, Deborah D.	Stillwater, Minn.	5
Minnesota Commercial Company.	Stillwater, Minn.	1125
Murdock, J. B.	Mansfield, Ohio.	12
National Revere Bank.	Boston, Mass.	106
New Hampshire National Bank.	Portsmouth, N. H.	103
National Bank of Commerce.	Boston, Mass.	209
National Exchange Bank.	Salem, Mass.	103
National Bank of Barre.	Barre, Vt.	205
National State Capitol Bank.	Concord, N. H.	194
Nichols, Jno. B.	Haverhill, Mass.	544
Newark City National Bank.	Newark, N. J.	104
National Grand Bank.	Marblehead, Mass.	53

Name.	Residence.	No. shares.
Nichols, Julia A.	Shrewsbury, Mass.	42
Northboro National Bank	Northboro, Mass.	193
National Eagle Bank	Boston, Mass	187
Naumkeag National Bank	Salem, Mass.	310
National Tube Works Company	Boston, Mass	12
Nicols & Dean	St. Paul, Minn.	11
Nash, Edw. H.	Westport, Conn	200
Nash, Amelia R	Westport, Conn	25
Nichols, Leroy E.	49 Phipp Avenue, Dorchester, Mass.	268
Nash, Edw. A.	Westport, Conn	25
Nash, Dan'l C.	Norwalk, Conn	25
Old Colony National Bank	Plymouth, Mass.	512
Ordway, Asa P.	Newburyport, Mass	21
Osborn, Francis A.	Boston, Mass	10
O'Hara, John J. (Care of Morehead, Irwin & Co.)	Cincinnati, Ohio	171
Penigiwasset National Bank	Plymouth, N. H.	51
Prescott, Chas. H.	Fitchburg, Mass.	21
Peverly, Sarah A.	Concord, N. H.	43
Potter, Lovell & Co.	Boston, Mass	1053
Proctor, Wm.	Chicago, Ill.	193
Pynchon National Bank	Springfield, Mass	103
112 Phinney, E. A	Minneapolis, Minn	2
Partridge, Mary S.	Stockton, Me	21
Putnam, Albert D	Danielson, Conn.	18
Pittsburg Hinge Company	Allegheny, Pa.	3
Quincy, Sam'l H.	Lancaster, Mass	49
Quinsigamond National Bank.	Worcester, Mass.	51
Quincy, Josiah	No. 19 Milk Street, Rms. 44-45, Boston, Mass.	4
Quincy, Grace W.	Lancaster, Mass	4
Randolph National Bank	Randolph, Mass.	53
Rice, Thos. Fred A. Brigham and H. A. Maynard, Exc. Est.	Riverside, R. I. / Shrewsbury, Mass.	107
Rice, Wm. E.	Worcester, Mass.	258
Roane Iron Company	Chattanooga, Tenn.	22
Rice, Emery E.	Woonsocket, R. I	9
Rice, Geo. H.	West Topsham, Vt.	9
Rice, Lucius E.	Togus, Me.	3
Rothwell, Thos. E.	Dorchester, Mass.	800
Roberts, Harry J.	Lowell, Mass	516
Stetson, Geo. (Edw. Stetson, Trustee.)	180 Exchange Street, Bangor, Me.	101
Sibley, Harriet, care of E. Reed.	148 State Street, Boston, Mass.	107
Sanborn, Josiah B	Concord, N. H.	128
Sibley, Harrington	Fitchburg, Mass.	21
Spencer, C. B.	63 Federal Street, Boston, Mass.	62
Second National Bank	Bangor, Me	200
Souhegan National Bank	Milford, N. H.	103
Streator Glass Company	Streator, Ill.	26
Spaulding, D. J	Black River Falls, Wis.	59
Stafford National Bank (Chas. M. Josyln, Rec.)	Stafford Springs, Conn. / Hartford, Conn.	80
Spaulding, Walter M.	Worcester, Mass.	4
Sabin, D. M.	Duluth, Minn.	70
Stoddard, John T., Trustee.	Plymouth, Mass.	11
Scribner, Edw. E.	St. Paul, Minn.	1
Schulenburg & Boeckler Lumber Company.	Stillwater, Minn.	23
Sanborn, Jos. B., Adm. Est Sarah J. Moore.	London, N. H.	21

Name.	Residence.	No. shares.
Shadbolt & Boyd Iron Company	Milwaukee, Wis.	10
Saftenberg, A. F.	Chicago, Ill.	1
Stow, Laura D.	Chelsea, Vt	8
Stetson, Lily G.	Bangor, Me	18
Stetson, Henry C.	Bangor, Me.	17
Trustees under will of Washington Reed.	Rockland, Mass	114
Toppan, Sarah M.	Cambridge, Mass	21
Turner, R. W. & Co	Randolph, Mass.	42
Taylor & Co.	Oakland, Cal.	11
Trustees E. Dresser, J. C. Carter and G. E. Carter, for Nellie M. Clark.	Cambridgeport, Mass.	37
Trustees E. Dresser, J. C. Carter and G. E. Carter, for Fannie C. Porter.	Cambridgeport, Mass.	37
Trustees E. Dresser, J. C. Carter and G. E. Carter, for Chas. H. Carter.	Cambridgeport, Mass.	37
Tibbits, Edw. H.	Norwich, Conn.	612
Union National Bank	Weymouth, Mass.	630
Van Wagenen, Jno. R. Prest.	Oxford, N. Y.	80
Ware National Bank	Ware, Mass.	104
Winchester National Bank.	Winchester, N. H.	107
Weeks, Geo. W.	Clinton, Mass.	21
113 Wyman, Isaac C.	33 School Street, Boston, Mass.	62
Whitely, John, Trustee.	Shirley Village, Mass.	42
Wilson, Wm., Trustee	Endfield, N. H.	42
Whittier, Sam'l	Deerfield, N. H	43
Wentworth, Jos.	Concord, N. H.	107
Woods, Maria H., Adm.	Concord, N. H.	42
Whitney, Chas. H.	Fitchburg, Mass	21
Windham Co. Savings Bank	Danielsonville, Conn.	385
Weeks, Jos. D. (dead)	Canaan, N. H.	11
Watertown Steam Engine Company	Watertown, N. Y.	31
Winslow Car Roofing Company (succeeded by Chicago-Cleveland Car Roofing Company.	Cleveland, O.	15
Woodstock Iron Company	Anniston, Ala	87
Williams, Wm. S.	Glastonbury, Conn.	107
White, Mrs. E. W.	4029 Walnut Street, Philadelphia, Pa.	20
Whitney, Marcus, Guardian	Gardner, Mass.	21
Woodbury, Clara A., now Mrs. O. T. Woodbury.	Fitchburg, Mass	32
Wilkins, Mrs. Eliza A.	Westport, Conn.	25
White, E. B.	Concord, N. H.	485
Wilson, William H.	Waltham, Mass	200
Sewall, Walter A.	Concord, N. H	85
Waterman, Henry	17 Milk Street, Boston, Mass.	128
Total Number of Shares		27,967

Name.	Address.	No. shares.	Date transferred.	To whom transferred.	Address.	No. shares.
Northfield Nat. Bank	Northfield, Vt.	103	Sept. 4, 1889	Rollin B. Delano	St. Paul, Minn.	103
Mass. L. & T. Co. Trustee	Boston, Mass.	6,000	Dec. 24, 1889	Cancelled under plan of reorganization		483
Saratoga Co. Bank	Waterford, N. Y.	103	Dec. 18, 1889	John Lawrence	Waterford, N. Y.	103
Executors Est. of Geo. P. Carter	Cambridgeport, Mass. (Care Geo. E. Carter.)	149	Jan. 17, 1890	Edwin Dresser, James C. Carter, Geo. E. Carter, Trustees for Nellie M. Clark.	Cambridgeport, Mass.	37
				Edwin Dresser, James C. Carter, Geo. E. Carter, Trustees for Fannie C. Porter.	Cambridgeport, Mass.	37
				Edwin Dresser, James C. Carter, Geo. E. Carter, Trustees for Chas. H. Carter.	Cambridgeport, Mass.	37
				Geo. E. Carter	Exc. Bldg., Boston	38
Herrick, Janette L. (Chas. E. Buell, Exc.)	Madison, Wis.	222	March 26, 1890	Amelia H. Doyan	Madison, Wis.	111
				Jeneva S. Herrick	Madison, Wis.	111
Reynolds, F. H. C., Ag't.	Bangor, Me.	30	May 16, 1890	Cancelled under plan of reorganization		30
Morse, Luther (Wm. H. Morse, Adm.)	Stillwater, Minn.	5	July 12, 1890	Deborah D. Morse	Stillwater, Minn.	5
Mass. Nat. Bank	Boston, Mass.	200	Aug. 13, 1890	H. C. Gridley	Stillwater, Minn.	200
Mass. Nat. Bank	Boston, Mass.	100	Sept. 3, 1890	H. C. Gridley	Stillwater, Minn.	100
Fogg, Crippen & Dewey, Trustees		42	Oct 1, 1890	Asa T. Jones	623 N. Cascade Ave., Col. Springs, Col.	42
Delano, Rollin B.	St. Paul, Minn.	103	Dec. 17, 1890	H. C. Gridley	Stillwater, Minn.	103
Fay & Co., J. A.	Cincinnati, O.	171	Feb. 17, 1891	Jno. J. O'Hara (Care of Morehead, Irwin & Co.)	Cincinnati, O.	171
Lawrence John (Jno. S. Lawrence & C. A. Waldron, Ex'rs.)	Waterford, N. Y.	51	March 6, 1891	Mary Porter Lawrence	Grand Rapids, Mich.	26
				John S. Lawrence	Grand Rapids, Mich.	25
Bagg, S. F.	Watertown, N. Y.	237	April 22, 1891	H. C. Gridley	Stillwater, Minn.	237
Buffington, E. D.	Stillwater, Minn.	4	June 4, 1891	H. C. Fogle	Canton, O.	1
				Self	Stillwater, Minn.	3
Goodhue, W. S.	Chicago, Ill.	4	Oct. 5, 1891	W. T. Barrett	Chicago, Ill.	4
Whitney, Guardian Ivers	Gardner, Mass.	21	March 11, 1892	Marcus Whitney, Guardian	Gardner, Mass.	21
Frothingham, A. T. (Almira W. Frothingham, Adm'x)	Boston (?)	110	April 29, 1892	Almira W. Frothingham	Cambridge, Mass.	110
Prince, F. M.	Minneapolis, Minn.	4	May 23, 1892	The Minnesota Commercial Co.	Stillwater, Minn.	4
Atlas Nat. Bank	Boston, Mass.	376	May 23, 1892	" " " "	" "	376
Fogg, Jno. S.	Boston, Mass.	50	May 23, 1892	" " " "	" "	50
O'Gorman, J. C.	Stillwater, Minn.	40	May 23, 1892	" " " "	" "	40
Executors Estate of L. E. Torinus	Stillwater, Minn.	6	May 23, 1892	" " " "	" "	6
Swan, Jessie L.	Stillwater, Minn.	80	May 23, 1892	" " " "	" "	80
Bailey, Isaac H.	New York City	31	May 23, 1892	" " " "	" "	31

Statement Showing Transfers of Preferred Stock—Continued.

Name.	Address.	No. shares.	Date transferred.	To whom transferred.	Address.	No. shares.
Fogg, Crippen, Dewey, Trustees		427	May 23, 1892	Lyman H. Goodnow, H. J. Crippen, D. B. Dewey, E. D. Buffington, Trustees	Fitchburg, Mass.	235
						192
Langdon, Cavour	Minneapolis, Minn.	4	May 24, 1892	The Minnesota Commercial Co.	Stillwater, Minn.	4
Hersey, R. F	Stillwater, Minn.	4	May 24, 1892	" " " "	" "	4
Snider, S. P.	Minneapolis, Minn.	4	May 24, 1892	" " " "	" "	4
Oppenheim, Ansel	St. Paul, Minn.	4	June 6, 1893	" " " "	" "	4
Lockey, Joseph	St. Paul, Minn.	4	May 24, 1892	" " " "	" "	4
Truesdell, Harry	Minneapolis, Minn.	4	May 24, 1892	" " " "	" "	4
Flandreau, C. E.	St. Paul, Minn.	4	May 24, 1892	" " " "	" "	4
				Emery E. Rice	Woonsocket, R. I.	4
Rice, Laura O., Geo. L. Stowe, Fred G. Carter, Exec'rs.	Lebanon, N. H.	42	May 26, 1892	Geo. H. Rice, Fred G. Carter, Adm. (?), Lucius E. Rice, Laura D. Stowe	Topsham, Vt., Lebanon, N. H., Togus, Maine	9 9 8 8
Grinley, H. C.	Stillwater, Minn.	640	May 27, 1892	Minnesota Commercial Co.	Chelsea, Vt., Stillwater, Minn.	8 640
First Nat. Bank	Norwich, Ct.	612	June 1, 1892	Edward H. Tibbits	Norwich, Ct.	612
Veazie Nat. Bank	Bangor, Me.	7	Nov. 1, 1892	Minnesota Commercial Co.	Stillwater, Minn.	7
Crippen, Buffington, Dewey, Trustees.		109	Nov. 1, 1892	" " "	Stillwater, Minn.	100
Bowan, Amelia H.	Madison, Wis.	111	June 21, 1893	Arvilla Doyan	Madison, Wis.	111
Frothingham, Almira W. (Wm. J. Mandell, Adm.)	Cambridge, Mass.	110	Oct. 3, 1893	Elizabeth S. Frothingham, Mrs. Almira W. Mandell	Cambridge, Mass.	55 55
115 Lawrence, John	Waterford, N. Y.	52	Oct. 30, 1893	Thos. Breslin	No. Cambridge, Mass. Waterford, N. Y.	52
Jno. S. Lawrence and Cornelius A. Waldron, Ex'rs.						
Cambridgeport Nat. Bank	Cambridgeport, Mass.	268	May 28, 1894	Leroy E. Nichols	49 Phipp Ave., Dorchester, Mass.	268
Crippen, Buffington, Dewey, Trustees.		105	July 28, 1894	Chas. H. Hayward, Maria J. Hayward, W. T. Barrett, W. T. Barrett	Fitchburg, Mass, Fitchburg, Mass, Chicago, Ill., Chicago, Ill.	21 21 21 21
Crippen, Buffington, Dewey, Trustees		405	July 28, 1894	Sarah J. Cook, G. H. & F. Cutler, Edw'd C. Crowell, G. H. Cutler, Oliver K. Baker, Cape Cod Nat. Bank, D. B. Dewey and E. D. Buffington (Surviving Trustees).	Fitchburg, Mass, Fitchburg, Mass, West Dennis, Mass., Fitchburg, Mass, West Dennis, Mass., Harwich, Mass.	21 21 21 21 21 214 85
Proctor, Wm.	Chicago, Ill.	29	Aug. 31, 1894	Greenlee Bros. & Co.	Chicago, Ill.	29
Pierce, Walter W.	Polo, Ill.	42	Nov. 1, 1894	W. T. Barrett	227 W. 12th St., Chicago, Ill.	42

Farwell, Dexter	Fitchburg, Mass	64	Nov.	2, 1894	Levi A. Farwell	Wiggins, Col	32
					Clara A. Woodbury	Fitchburg, Mass	32
The Minnesota Commercial Co	Stillwater, Minn	640	Dec.	27, 1894	S. F. Bagg	Watertown, N. Y	237
					Minn. Com'l Co	Stillwater, Minn	403
H. J. Crippen	Concord, N. H	485	June	3, 1895	C. F. Batchelder	Concord, N. H	485
By Anson T. Marshall, Administrator Estate H. J. C.					Samuel H. Quincy	Lancaster, Mass	7
Martha G. Sleeper, Mrs. Sam'l H. Quincy, and Elizabeth F. Dix, Exrs	Lancaster, Mass	21	Feb.	19, 1896	Josiah Quincy	19 Milk St., Boston, Mass	7
Union Foundry & Mach. Wks	Mansfield, O	12	Jan	25, 1897	Elizabeth F. Dix	Lancaster, Mass	7
Boston Nat. Bank	Boston, Mass	516	May	14, 1897	J. B. Murdock	Mansfield, O	12
					Harry J. Roberts	Lowell, Mass	516
Osborn, Francis A	Boston, Mass	20	May	14, 1897	Stephen M. Crosby	Boston, Mass	10
					Francis A. Osborn	Boston, Mass	10
Stetson & Co	Bangor, Me	104	July	28, 1897	Lily G. Stetson	Bangor, Me	18
Edward Stetson and Josiah K. Stetson, executors of estate of Geo. Stetson. Sarah Jewett Stetson, trustee and sole executrix of estate of J. Stetson.					Estate of Geo. Stetson	Bangor, Me	52
					Henry C. Stetson	Bangor, Me	17
					Louise F. Stetson	Bangor, Me	17
Wachusetts Nat. Bank	Fitchburg, Mass	63	June	16, 1898	G. E. Clifford	Fitchburg, Mass	63
					Albert D. Putnam	Danielson, Ct	18
First Nat. Bank of Killingly	Danielson, Conn	54	June	25, 1898	C. S. Burlingame	Danielson, Ct	18
					Chas. P. Barkus	Danielson, Ct	18
					Daniel C. Nash	Norwalk, Ct	25
					Edw'd A. Nash	Westport, Ct	25
Nash, Andrew C	Westport, Conn	100	Nov.	17, 1898	Mrs. Elija A. Wilkins	Westport, Ct	25
Daniel C. Nash, Edward A. Nash, executors.					Amelia R. Nash	Westport, Ct	25
Cutler, G. H. & T	Fitchburg, Mass	21	Dec.	2, 1898	Mary E. Cutler	Fitchburg, Mass	5
Clark A. Batchelder, administrator of estate of Tarrant Cutler, one of the partners.					Geo. H. Cutler	Fitchburg, Mass	16
Wm. A. Rust	Boston, Mass	100	Dec.	16, 1898	Tremont Nat. Bank	Boston, Mass	90
					Henry Endicott	Boston, Mass	10
Tufts, Geo. K	New Braintree, Mass	21	Feb.	14, 1899	Allie E. Bishop	New Braintree, Mass	21
Sikes & Co., S. R	Minneapolis, Minn	7	March	7, 1899	James Brennan	P. O. Box 484, Minneapolis, Minn.	7
					Grace W. Quincy	Lancaster, Mass	1
Sam'l H. Quincy	Lancaster, Mass	2	March	20, 1899	Samuel H. Quincy	Lancaster, Mass	1
					Grace W. Quincy	Lancaster, Mass	3
Quincy, Josiah H	Boston, 19 Milk St	7	March	20, 1899	Josiah H. Quincy	Boston, Mass	4
					Henry Endicott	Boston, Mass	100
Tremont Nat. Bank	Boston, Mass	800	May	6, 1899	Tremont Nat'l B'k	Boston, Mass	700
Batchelder, C. F	Concord, N. H	485	Nov.	23, 1900	E. B. White	Concord, N. H	485
Tremont Nat. Bank	Boston, Mass	700	Nov.	28, 1900	Thos. E. Rothwell	Dorchester, Mass	700
Endicott, Henry	Boston, Mass	10	Nov.	28, 1900	Thos. E. Rothwell	Dorchester, Mass	10
Merchants Nat. Bank	Salem, Mass	200	Dec.	12, 1900	Wm. H. Wilson	Waltham, Mass	200
Abbott, Emily J (John Kimball, Ex.)	Concord, N. H	85	Dec.	18, 1900	Walter A. Sawell	Concord, N. H	85
Bell, A. D. S	Boston, Mass	29	Jan.	8, 1901	Henry Waterman	17 Milk St., Boston, Mass	29
Monument Nat. Bank	Charlestown, Mass	99	Jan.	8, 1901	Henry Waterman	17 Milk St., Boston, Mass	99

116 *List of Present Common Stockholders of Record of Minnesota Thresher Manufacturing Company.*

Name.	Residence.	No. shares.
Allen, Gilman L	Shrewsbury, Mass	12
Ayer, James B	58 Mt. Vernon Street, Boston, Mass.	28
Ashley, Rev. Sam'l S	Northboro, Mass	20
Adams, Mary M	Northboro, Mass	10
Adams, Harriet P	1100 "M" Street, Washington, D. C.	4
Arnold, Ansel	Willimantic, Conn	20
Andrews, P. St. M	Norwich, Conn	60
Armstrong, Sarah P	48 Prospect Street, Norwich, Conn.	20
Abbott, Harlan P	393 Broad Street, Providence, R. I.	10
Ashworth, Jno. W	Ticonderoga, N. Y	8
Atwood, Julia A. M	Wauregan, Conn	34
Atwood, J. Walter	Wauregan, Conn	33
Atwood, J. Arthur	Wauregan, Conn	33
Bigelow, Cornelia W	Clinton, Mass	10
Bigelow, Henry N	Clinton, Mass	20
Bates, Emery L	Fiskdale, Mass	370
Bemis, Frederick G (Jno. W. Bemis, Adm'r.)	60 Devonshire Street, Boston, Mass.	25
Bean, Martha S	Framingham, Mass	10
Bartlett, Martha A	Mansfield, Mass	10
Birkenhead, Jno	Mansfield, Mass	50
Baker, Mrs. Julia V	Antrim, N. H	6
Brown, M. M. E	Edward Street, Worcester, Mass	30
Ball, Walter J	Townsend, Mass	14
Breed, Prudence A	Norwich, Conn	12
Baker, Jno. A	Concord, N. H	25
Blodgett, Susan A	Concord, N. H	20
Bemis, Dolly Ann	50 Cherry Street, Spencer, Mass	31
Brigham, Nath'l S	Worcester, Mass	10
Brigham, Mary P	Northboro, Mass	18
Bartlett, Wm. L	Northboro, Mass	14
Bradley, Anna E (Care of A. W. Seaver.)	Northboro, Mass	8
Brigham, Chas. L	Hudson, Mass	100
Burnap, James P	Marlow, N. H	40
Bouve, Walter L	119 Devonshire Street, Boston, Mass.	20
Bates, Arthur L	Fiskdale, Mass	60
Brainard, Harriette E	156 Washington Street, Hartford, Conn.	50
Brown, Mary E	West Lebanon, N. H	10
Bradley, Joseph S	129 Summer Street, Boston, Mass	50
Blodgett, Emma Susie (Care of J. F. D. Garfield.)	Fitchburg, Mass	40
Brooks, John	Princeton, Mass	10
Bigelow, Maria E	Dedham, Mass	2
Bartlett, Ursula J	New Worcester, Mass	17
Banks, Frederick J	Bridgeport, Conn	22
Booth, Louis N	Bridgeport, Conn	25
Bankhead, David	Pelham, N. Y	50
Booth, David B	Stratford, Conn	20
Bunnell, Rufus W	Bridgeport, Conn	10
Bright, Wm. M	Bangor, Me	20

	Name.	Residence.	No. shares.
117	Baker, Walter S.	Concord, N. H.	5
	Bailey, Sarah M.—(Lucy Geer, Exc.)	Norwich, Conn.	40
	Beers, Emily	Southport, Conn.	10
	Bright, George A.	Bangor, Me	20
	Bright, Mary G	Bangor, Me	11
	Booth, Emily	Stratford, Conn	5
	Brown, H. Martin. (Care of Brown Bros. & Co.)	Providence, R. I.	25
	Bloom, Frank A.	So. Manchester, Conn.	40
	Banister, Mrs. Mary E.	Fitchburg, Mass	20
	Briggs, Edwin O.	West Scituate, Mass	20
	Batchelder, John C	Danvers, Conn.	20
	Bernheimer, Adolph	51 and 53 White Street, New York City.	100
	Bernheimer, Isaac	320–2 Broadway, New York City.	200
	Bernheimer, Simon	320–2 Broadway, New York City.	200
	Bouton, M. D., Geo. B.	Westport, Conn.	100
	Burr, Ebenezer (Trustee Est. of David Banks.)	Bridgeport, Conn.	20
	Bowers, Mrs. Ellen A	Clinton, Mass	20
	Butters, Susan B.	409 Westford Street, Lowell, Mass.	10
	Bright, A. E. & J. M. (Excts. Est. of Jno. Bright.)	Bangor, Me.	20
	Breck, Mrs. Mary A	E. Somerville, Mass.	20
	Brett, Victor, Adm'r.,	Bangor, Me	25
	Bulkley, Benj. A	Southport, Conn.	20
	Bacon, Jennie M.	Fiskdale, Mass.	10
	Bourne, Lemuel.	Amboy, Ill.	6
	Bidwell, Corrinne B.	Collingsville, Conn	100
	Cowan, P. D.	Canastota, N. Y.	23
	Cowan, Mrs. Margaret R.	Canastota, N. Y.	2
	Cutler, Geo. H	Fitchburg, Mass.	120
	Cabot, John W. (Care of F. E. Cabot.)	19 Congress Street, Boston, Mass.	12
	Cochrane, Clark B	Antrim, N. H	10
	Caldwell, B. F.	Concord, N. H.	100
	Cogswell, P. B. (Sam'l C. Eastman, Exc.)	Concord, N. H.	10
	Crippen, S. J (Care of H. J. Crippen.)	Concord, N. H.	20
	Curtis, Calvin.	Stratford, Conn	10
	Curtis, Celia.	Stratford, Conn	14
	Cully, Eli.	Fitchburg, Mass.	20
	Conant, Edwin.	Worcester, Mass.	70
	Cogswell, C. P.	Norwich, Conn.	100
	Childs, Chas. H	Providence, R. I.	5
	Cox, Francis (Care of Edward C. Browne, Exc.)	40 Summit Street, Salem, Mass.	50
	Clark, Thos. H. (Mrs. Ellen E. Clark, Exc.)	Valley Falls, R. I.	20
	Currier, Anna R.	Holyoke, Mass.	10
	Curtis, Andrew B.	Stephney Depot, Conn.	20
	Craw, Mrs. F. R.	469 Kenard St., Cleveland, O.	2
	Couch, A. M.	New Fairfield, Conn	80
	Cheever, Henry T. (Eliza Cheever Wheeler, Exc.)	No. 8 State Street, Worcester, Mass.	8
	Church, Lucy T	Hampton, Conn.	20
	Carter, Geo. E.	Exchange Bldg., Boston, Mass.	50

Name.	Residence.	No. shares.
118 Campbell, Mrs. Jennie Cushing, L. B.	Albany, N. Y	20
Cushing, Margaret W.	Newburyport, Mass.	50
Cushing, Fannie E.	Newburyport, Mass.	10
Curtis, Roderick P.	Newburyport, Mass	10
Curtis, Lewis B	Bridgeport, Conn.	25
Childs, Nettie S. (Care of Ruthven Childs.)	Bridgeport, Conn.	25
Curtis, Esther L.	Hillsborough, N. H	20
Chandler, Letitia G	157 E. Main Street, Bridgeport, Conn.	15
Castle, James N.	Detroit, Mich	60
Cutler, Mary E.	Stillwater, Minn.	150
Dole, Mrs. Sarah A.	Fitchburg, Mass.	50
Daniels, Geo. T.	20 Bigelow Street, Cambridgeport, Mass.	10
Daniels, Mary F.	Fitchburg, Mass.	20
Dutton, Mary H.	Fitchburg, Mass.	20
Davis, Mary E.	Lebanon, Conn.	10
Dibble, Emeline.	Northboro, Mass.	22
Dresser, E., Carter, J.C. and Carter, G.E. (Trustees for Nellie M. Clark.)	Bridgeport, Conn	28
Dresser, E., Carter, J.C. and Carter, G.E. (Trustees for Fannie C. Porter.)	Cambridgeport, Mass.	50
Dresser, E., Carter, J.C. and Carter, G.E. (Trustees for Chas. H. Carter.)	Cambridgeport, Mass.	50
Dewey, D. B., Buffington, E. D. and Morgan, D. N., Trustees.	Cambridgeport, Mass.	50
Day, Ellen L.		9811
Dewing, Eva V	Worcester, Mass.	10
Ely, Dudley P.	Golden Gate, Cal. (Alameda Co.).	20
Ely, Dudline P.	South Norwalk, Conn	40
Eddy, Frederick A.	South Norwalk, Conn.	5
Estate of Horace G. Pond. (Lurah G. Pond, Adm.)	Bangor, Me	100
Ellis, Lucy J.	Hubbardston, Mass.	20
Eddy, Wm. J.	Newton Center, Mass.	10
Estate of E. M. Stockwell. (Harriet E. Stockwell, Adm.)	No. 3 Agawain Street, Worcester, Mass.	6
Estate of Mrs. C. W. Rose (F. M. Rose, Exc.)	13 Harvard Street (?) Worcester, Mass.	60
Foster, Wm. A.	Faribault, Minn.	2
Fogg, Jno. S.	Corning, N. Y.	40
Farley, Nathan	Boston, Mass	200
Fisk, Anna E. D. (Henry R. Davis, Adm.)	New Boston, N. H	10
Fairbanks, Mary J. N. (W. A. Fairbanks, Exc.)	Northboro, Mass.	10
Ferrin, Alvah, C. (Mrs. A. C. Ferrin, Exc.)	Westboro, Mass.	10
Fowler, Amos T.	Fitchburg, Mass.	100
Fowler, Mrs. A. E.	37 School Street, Concord, N. H.	12
Frost, Abbie T.	Willimantic, Conn.	20
Frost, Roger P.	Willimantic, Conn.	10
Fairbanks, Anna D.	Fitchburg, Mass.	10
Fiske, Sarah D	Fitchburg, Mass.	20
Farley, H. Nelson	Box 172, Northboro, Mass.	12
Farnum, Mrs. S. E. (née L. E. Farnum.)	Hingham, Mass.	2
Fuller, Luther	Concord, N. H.	10
	2033 Sanson, Street, Philadelphia, Pa.	2
	1613 Florida Avenue, Washington, D. C.	40

	Name.	Residence.	No. shares.
119	Frost, Augusta E	So. Norwalk, Conn.	4
	Fox, Virginia, L. W.	"The Richmond," Washington, D. C.	28
	Fitchburg Home for Old Ladies	Fitchburg, Mass.	45
	Goodnow, Lyman H., Trustee	Fitchburg, Mass	30
	Goss, Jonas	Clinton, Mass.	10
	Gay, Wm. R.	Lebanon, Conn.	100
	Gould, Edward (Albert F. Gould, Adm.)	Worcester, Mass.	85
	Gale, Cyrus	Northboro, Mass.	20
	Garfield, Mary L. (Care of J. F. D. Garfield.)	Fitchburg, Mass	40
	Gray, Howard	Dorchester, Mass.	6
	Glover, Betsey A.	Newton, Mass	10
	Glover, M. Effie	Newton, Mass	10
	Glover, M. Elizabeth	Newton, Mass	10
	Goodsell, Alfred T	Westport, Conn	12
	Gleason, Wilbur A.	Bridgeport, Conn	4
	Griffin, John.	Newtown, Ct., P. O. Cold Spring.	50
	Glover, Susan N.	Hartford, Conn., or Bridgeport, Conn.	20
	Gould, James L.	295 Fairfield Avenue, Bridgeport, Conn.	20
	Griffin, Geo	Newtown, Ct., P. O. Cold Spring	20
	Geer, Lucy	Norwich, Conn	90
	Geer, Abby	Norwich, Conn	20
	Geer, Ellen	Norwich, Conn	90
	Geer, Robert	Albany, N. Y.	70
	Geer, Fred L.	Albany, N. Y.	6
	Glover, Mary B	Newtown, Conn.	20
	Griffing, Bruce N	Shelton, Conn	120
	Grassie, Mary M.	53 Prospect Street, Worcester, Mass.	20
	Geer, Arthur H	Albany, N. Y	4
	Gibbs, Mrs. Mary E.	60 Erskine Street, Detroit, Mich.	100
	Griffing, C. E (Adm. of Andrew Northup.)	Danbury, Conn	30
	Griffing, C. E (Adm. of Kate M. Northup.)	Danbury, Conn.	10
	Hunnewell, James F.	13 Green Street, Charlestown, Mass.	80
	Hunnewell, James F., Trustee	13 Green Street, Charlestown, Mass.	10
	Haskell, Maria A	Clinton, Mass.	40
	Haskell, Harriet M	Clinton, Mass.	20
	Hall, L. A.	So. Coventry, Conn	75
	Hartshorn, Louisa S	Berlin, Mass.	10
	Hayden, Chas. S., Trustee	Fitchburg, Mass	12
	Hastings, Louisa S., Guardian	Berlin, Mass.	10
	Hartshorn, Lucy E.	Monroe Street, Somerville, Mass.	10
	Harris, Chas. M.	Oakdale, Mass.	25
	Harris, Henry F.	405 Main Street, Worcester, Mass.	25
	Harris, Clara A	Oakdale, Mass.	10
	Harris, Emily S.	Oakdale, Mass.	10
	Holcomb, Julia A.	Bridgeport, Conn	5
	Hill, Seth	Stepheny Depot, Conn	10
	Hillman, Mrs. Martha R.	Barre, Mass.	20
	Hamlin, Ellen V.	Bangor, Me.	12
	Hamlin, Chas.	Bangor, Me	12
	Hamlin, Hannibal E.	Elsworth, Me.	12
	Hamlin, Frank	107 Dearborn Street, Chicago, Ill.	12
	Haskell, Eunice H.	Clinton, Mass.	10
	Hale, Mary C	Ellsworth, Me.	60

Name.	Residence.	No. shares.
120 Holbrook, L (Exc. estate of Susan H. Gale.)	Box 536, New York City	27
Jenks, Harriet S (Care of Edward A. Jenks.)	Concord, N. H.	40
Johnson, Chester N. or Mary A	E. Templeton, Mass	60
Jennison, Eunice	Fitchburg, Mass	24
Jennings, Eliza M.	Westport, Conn	20
Jessup, Julia F.	Southport, Conn	25
Judson, Jerome	Sandy Hook, Conn.	20
Jennings, Walter	Southport, Conn	15
Jennings, Deborah	Southport, Conn	1
Jerome, Frank S	Norwich, Conn	100
Kirkwood, T. S	43 Monroe Street, Chicago, Ill.	200
Keeler, S. B	Bridgeport, Conn	10
King, Mary A. E	No. Leominster, Mass	20
Kohn, Julius	44 Broad Street, New York City	100
Lord, Chas. S	Otter River, Mass	20
Lathrop, Amanda S (Care of H. M. Bigelow.)	Clinton, Mass.	2
Lowell, Caleb C.	Bangor, Me.	10
Lawrence, O. H.	Fitchburg, Mass	35
Lincoln, Nathan	18 Fayette Street, Cambridgeport, Mass.	40
Lincoln, Nathan F.	18 Fayette Street, Cambridgeport, Mass.	20
Lincoln, William S. (Levi Lincoln, Winslow S. Lincoln, Exes.)	Worcester, Mass.	19
Lanphear, H. Dwight	North Windham, Conn	10
Littlehale, J. D. Exc.	Fitchburg, Mass	6
Lake, Jno. M	Monroe, Conn	10
Lacy, Mary A.	Platteville, Conn.	20
Lockey, Jno. M. (As guardian of Mary E. Burgess.)	Leominster, Mass	10
Lake, Katherine L.	137 College Avenue, New Haven, Conn.	30
Littlefield, Ida B.	41 Wolcott Street, Pawtucket, R. I.	20
Mason, Abby J (Mary H. Dutton, Exc.)	Lebanon, Conn	10
Moseley, Franklin	Concord, N. H.	100
Maderia, Clara S	1541 Arch Street, Philadelphia, Pa.	10
McNeil, W. H	Lancaster, Mass.	100
Morgan, Medora H.	Bridgeport, Conn	10
Mallet, Sylvanus S.	Easton, Conn	10
Morgan, D. S	Bridgeport, Conn	240
Munroe, Hamlet (Dec.)	Northboro, Mass	4
Merritt, Monroe D.	East Templeton, Mass.	30
Mason, Frank	Groton, Mass.	12
Minnesota Commercial Co.	Stillwater, Minn.	18,212
Millard, W. H.	Delhi, N. Y	20
Murphy, Eliza J	265 East Main Street, Bridgeport, Conn.	10
Millard, Geo. H.	Delhi, N. Y.	40
Newton, Theresa A (Care of J. D. F. Garfield.)	Fitchburg, Mass	60
Natick Five Cents Savings Bank	Natick, Mass.	200
Nash, Edw. H.	Westport, Conn.	400
Nash, Edw. A	Westport, Conn.	90
Nash, Daniel C	Norwalk, Conn	60
Nourse, Henry H.	Marlboro, Mass.	20

Name.	Residence.	No. shares.
Nourse, Chas. W.	33 Huntington Avenue, Marlboro, Mass.	20
Nichols, Mary J.	Stepney, Conn.	10
Nash, Amelia R.	Westport, Conn.	65
121 Nealley, Jas. A.	Providence, R. I.	20
Osgood, Elizabeth W. (Herbert C. Newell, Exc.)	550 Pearl Street, New York City.	25
Orcutt, Jerome.	Bridgeport, Conn.	10
Phillips, Mrs. Sarah J (Now Mrs. Sarah J. Cook.)	50 Nassau Street, Fitchburg, Mass.	10
Pike, Chas. C. (Address Mrs. C. C. Pike.)	Peabody, Mass.	30
Prouty, David	Spencer, Mass.	259
Potter, James B (Clara Potter, Adm.)	97 Ocean Street, Dorchester, Mass.	80
Pratt, Jno. M.	South Ashburnham, Mass	50
Pennell, Leida M	Brunswick, Me	15
Proctor, Josiah	Northboro, Mass.	10
Peck, John H.	Enfield, Mass	30
Pitts, Etta L.	Leominster, Mass	25
Pitts, Abbie E.	Leominster, Mass.	25
Palmer, John	Albany, N. Y.	100
Pierce, Etta F.	North Leominster, Mass., Box 305.	20
Peffers, Wm. C.	New Fairfield, Conn	10
Perkins, Jacob H. (Care of D. S. Spaulding.)	Mansfield, Mass.	10
Prentiss, Mrs. Adeline A	Windham, Vt.	16
Putnam, Chas. W. B., Adm'r.	Fitchburg, Mass.	160
Proctor, Geo. N.	Fitchburg, Mass.	100
Paret, Carrie G. Clarke.	La Conea Verde, near Stroudsburg, Pa. (Monroe Co. Box 516.)	40
Rice, Thos. (Fred. A. Brigham, H. A. Maynark, Exes.)	Riverside, R. I. / Shrewsbury, Mass.	100
Rice, Emma L.	Worcester, Mass	100
Rice, James D.	Worcester, Mass	100
Rice, Lucy W.	Worcester, Mass	100
Rice, William E.	Worcester, Mass	100
Roote, Abbie K (Care of C. B. Roote.)	Northampton, N. H.	20
Read, Delina.	Fall River, Mass.	30
Risley, O. H. K. (Geo. E. Stiles, Adm.)	Willimantic, Conn.	100
Redman, Anna G. P.	1081 Chapel Street, New Haven, Conn.	10
Rogers, Samuel T.	166 John Street, Bridgeport, Conn.	32
Rice, Carlo	Barre, Mass.	10
Rice, Emery.	Barre, Mass.	10
Rice, Edmund, Jr.	Olympia, Wash.	400
Rhode Island Society of Cincinnati. (Wm. Delion King, Treas.)	Sandwich, Mass.	8
Stickney, A. B.	St. Paul, Minn.	545
Slater, Jas. F. (Dec'd).	Bangor, Me.	10
Sweetser, Nancy C. (Care of A. H. Sweetser.)	25 Kilby Street, Boston, Mass.	16
Swan, Chas. L.	Clinton, Mass	120
Spaulding, Harriet N.	Townsend, Mass.	6
Slater, Lydia R	Webster, Mass.	12
Straton, C. C., Trustee.	Fitchburg, Mass.	50

	Name.	Residence.	No. shares.
	Stanton, R. P (Harriet S. Blackmar, Adm.)	Norwich, Conn	20
	Seaver, A. W	Northboro, Mass	32
	Seaver, A. W (Att'y for Adaline K. Nelson.)	Northboro, Mass	40
122	Safford, Adeline D. (Henry R. Davis, Adm.)	Evenlt, Mass	12
	Seaver, A. W (Trustee "Houghton Est.")	Northboro, Mass	3
	Sibley, Harrington	Fitchburg, Mass	90
	Sheldon, Thos. C	Fitchburg, Mass	10
	Spaulding, Francis W	Mansfield, Mass	10
	Sheldon, W. G. (Address Mrs. A. M. Parker [Sheldon dead].)	Eagleville, Conn Houston, Tex	6
	Swift, Martha G (Kate L. Dimock, Exc.)	Mansfield Depot, Conn	10
	Skerry, Jennie E	Warren, Mass	70
	Staples, Alonzo	Greenfield Hill, Conn	10
	Sawtelle, Mrs. S. J. (Care of H. E. Woods.)	Fitchburg, Mass	15
	Stuart, Geo. W	Newtown, Conn	20
	Sherwood, Daniel	Hartford, Conn	8
	Sears, Marshall H	Newtown, Conn., P. O. Cold Spring.	10
	Stevens, Wm. P	Willimantic, Conn	20
	Sanford, Chas. G	Bridgeport, Conn	50
	Small, Sumner	Northboro, Mass	10
	Scandrett, Mrs. I. M. W	Faribault, Minn	2
	Sherman, Andrew B	Fitchburg, Mass	100
	Smith, Chas. E	West Brookfield, Mass	40
	Scruton, Chas. A	Arkansas City, Kansas	20
	Sherwood, E. C (Exc. Est. of Mrs. Abby Martinson.)	Southport, Conn	14
	Simmons, Armenia H	Bridgeport, Conn	80
	Somers, Phoebe	Leominster, Mass	20
	Schenck, Mrs. E. H. (Care of Geo. Montague.)	Pres. Second National Bank, New York City.	10
	Thompson, E. R. (O. A. Beckwith, Adm.)	Collinsville, Conn	100
	Tolman, Cyrus S	Fitchburg, Mass	40
	Tyler, L. C., Trustee	Bangor, Me	8
	Taylor, Cornelius B	Newtown, Conn	70
	Towcey, Mary A (Alfred B. Beers, Att'y estate of Mary A. Towcey.)	Long Hill, Conn Rooms 4, 5, 6, Sturdevant Bldg., Bridgeport, Conn.	10
	Turney, Sherman F	13 Desbrosses Street, New York City.	10
	Turney, Geo. A	Birmingham, Conn	10
	Towsey, Mary B. (Union Trust Co., Exc.)	New York, N. Y South Broadway, New York City.	20
	Tracy, Henry R	16 Worcester Square, Boston, Mass.	100
	Tracy, Isabella M	Chautauqua, N. Y	20
	Valentine, Catherine B	Northboro, Mass	22
	Very, Mrs. Julia S	Hartford, Conn	9
	Whiteley, Jno., (S. S. Niles, Trustee for C. B. Walker.	Shirley Village, Mass	20 20
	Whitney, Chas. H	Fitchburg, Mass	20
	Williams, Lovell. (Eliza Williams Lawrence, Executrix.)	Fitchburg, Mass	100
	White, A. A	Morehead, Minn	60

Name.	Residence.	No. shares.
Worcester National Bank	Worcester, Mass.	179
White, Chas. J.	5 Prescott Hall, Cambridge, Mass.	24
White, Naaman L.	Weymouth, Mass.	20
Whitaker, Nat. C.	Northboro, Mass.	16
123 Walker, George M.	Cor. Bennett and Main Sts., Worcester, Mass.	100
Whittemore, Eli J.	776 Main Street, Worcester, Mass.	40
Whitney, Chas. S.	Fitchburg, Mass.	8
Wilson, Mrs. Jos. S.	Fitchburg, Mass.	20
Wilson, Jos. S. (Eliza Wilson, Exc.)	Fitchburg, Mass.	44
Wetmore, Edwin D.	Lebanon, Conn.	11
Woodward, S. E.	67 Prichard Street, Fitchburg, Mass.	10
Williams, Ellen	Northboro, Mass.	12
Winch, Leonard. (R. W. Harwood, Adm'r.)	Natick, Mass.	10
Whitney, James.	Natick, Mass.	5
Winch, Valetta A.	Natick, Mass.	4
Wakeman, Virginia D. (Now Mrs. W. B. Van Wagener.)	Southport, Conn.	20
Wakeman, Mrs. Maurice.	Southport, Conn.	20
Wood, Chas. E.	Northboro, Mass.	4
Whipple, Cornelia.	Faribault, Minn.	4
Wilcox, W. F.	Deep River, Conn.	20
Wright, John Q.	Fitchburg, Mass.	40
Wilson, Esther M.	P. O. Box 2355, New York City.	20
Wheeler, Alice B.	Worcester, Mass. (?)	230
Whitney, Harrison B. (Francella Whitney, Exc.	Leominster, Mass.	10
Whitney, Chas. S.	Westminster, Mass.	10
Wilkins, Mrs. E. A.	Westport, Conn.	56
Weissbach, Joseph	Boston, Mass.	480
Young, Sarepta	Mansfield Centre, Conn.	40
Total Number of Shares		42,594

Name.	Address.	No. shares.	When transferred.	To whom transferred.	Address.	No. shares.
Wheeler, Rebecca B.	Worcester, Mass.	230	Sept. 12, 1889	Alice B. Wheeler	Worcester, Mass.	130
			Sept. 16, 1889	Alice B. Wheeler	Worcester, Mass.	100
Carter Estate, Geo. P. By James C. Carter, Wm. B. Weston, Edwin Dresser, Geo. E. Carter, Ex'rs.	Cambridgeport, Mass.	100	Jan. 17, 1890	Edwin Dresser, James C. Carter, Geo. E. Carter, Trustees for Nellie M. Clark.	Cambridgeport, Mass.	50
" " "			Jan. 17, 1890	Edwin Dresser, James C. Carter, Geo. E. Carter, Trustees for Fannie E. Porter.	Cambridgeport, Mass.	50
" " "	Cambridgeport, Mass.	100	Jan. 17, 1890	Edwin Dresser, James C. Carter, Geo. E. Carter, Trustees for Chas. H. Carter.	Cambridgeport, Mass.	50
			Jan. 17, 1890	Geo. E. Carter	Exchange Bdg. Boston,	50
Geer, Jas. L.	Norwich, Conn.	100				
Geer, Mrs. Jas. L.	Norwich, Conn.	20				
Geer, Rob't	Albany, N. Y.	60				
Geer, Rob't	Albany, N. Y.	10				
Geer, Rob't, Trustee	Albany, N. Y.	4	Feb. 5, 1890	D. B. Dewey, E. D. Buffington and D. N. Morgan, Trustees.		320
Geer, Ellen	Norwich, Conn.	40				
Geer, Fred L.	Albany, N. Y.	6				
Geer, Lucy	Norwich, Conn.	20				
Bailey, Sarah M.	Norwich, Conn.	40				
Geer, Abby	Norwich, Conn.	20				
			March 3, 1890	Harrison B. Whitney	Leominster, Mass.	10
			March 3, 1890	Ellen N. Day	Worcester, Mass.	10
Whitney, Harrison J. (Hamilton Mayo, Adm.)	Westminster, Mass.	40	March 3, 1890	John M. Lockey as Guardian of Mary E. Burgess.	Leominster, Mass.	10
			March 3, 1890	Chas. S. Whitney	Westminster, Mass.	10
Wheeler, Alfred M. By Mary E. Bannister, Adm'x.	Fitchburg, Mass.	20	July 21, 1890	Mrs. Mary E. Bannister	Fitchburg, Mass.	20
Campbell, Jas. S. By Jennie S. Campbell, Adm'x.	Albany, N. Y.	20	Sept. 30, 1890	Mrs. Jennie Campbell	Albany, N. Y.	20
Cox, Mrs. Caroline E.	Melrose, Mass.	20	Oct. 23, 1890	John C. Batchelder	Danvers, Mass.	20
Bowker, Mrs. Francis A.	Melrose, Mass.	20	Oct. 23, 1890	Edwin C. Briggs	West Scituate, Mass.	20
Merritt, Dexter P.	East Templeton, Mass.	30	Nov. 15, 1890	Monroe D. Merritt	East Templeton, Mass.	30
Fuller, Thos. H.	1613 Florida Ave, Washington, D. C.	33	Nov. 24, 1890	Robert B. Fuller	Birmingham, Conn.	33
Spalding, Miles	Groton, Mass.	10	Oct. 10, 1891	Frank Mason	Groton, Mass.	10
Spalding, Mary S.	Groton, Mass.	2		Frank Mason	Groton, Mass.	2

Ayer, James. By James B. Ayer, Admr.	Boston, Mass.	20	March	11, 1892	Mrs. Mary A. Ayer Jas. B. Ayer	53 Mount Vernon St., Boston. 53 Mount Vernon St., Boston.	7 13
Dewey, Buffington & Morgan, Trustees.		8	April	22, 1892	Dan'l Sherwood	Hartford, Conn.	8
Dewey, Buffington & Morgan, Trustees.		26	April	22, 1892	W. S. Goodhue	183 South Water St., Chicago.	26
Dewey, Buffington & Morgan, Trustees.		120	April	22, 1892	Geo. W. Stewart Rufus W. Bunnell Wm. C. Peffers A. M. Couch	Newtown, Conn. Bridgeport, Conn. New Fairfield, Conn. New Fairfield, Conn.	20 10 10 80
Dewey, Hersey & Morgan, Trustees.		158	April	30, 1892	Adolph Bernheimer Virginia L. W. Fox* Dewey, Buffington & Morgan, Trustees	51 White St, New York "The Richmond," Washington, D. C.	100 28 30
Dewey, Hersey & Morgan, Trustees.		10	May	5, 1892	S. R. Keeler	Bridgeport, Conn.	10
Dewey, Bouve & Morgan, Trustees Dewey, Buffington & Morgan, Trustees.		602 320	May May	5, 1892 5, 1892	Edward H. Nash Andrew C. Nash Edward A. Nash D. N. Morgan Frederick J. Banks	Bridgeport, Conn. Westport, Conn. Westport, Conn. Westport, Conn. Bridgeport, Conn. Bridgeport, Conn.	400 200 40 240 22
Dewey, Hersey & Morgan, Trustees.		45	May	23, 1892	Chas. A. Scruton Lyman H. Goodnow, Trustee Dewey, Buffington & Morgan, Trustees	Arkansas City, Kan. Fitchburg, Mass. Stillwater, Minn.	20 30 15 2,060
Dewey, Hersey & Morgan, Trustees.		2,060	May	24, 1892	The Minnesota Commercial Co.	Stillwater, Minn.	13,708
Dewey, Hersey & Morgan, Trustees.		13,744	May	24, 1892	The Minnesota Commercial Co. Mrs. Julia S. Very Dewey, Buffington & Morgan, Trustees	Hartford, Conn. Stillwater, Minn.	9 27 26
125 Goodhue, W. S.	183 S. Water Street, Chicago, Ill.	26	May	27, 1892	The Minnesota Commercial Co.	New Haven, Conn.	30
Dewey, Buffington & Morgan, Trustees.		40	May	28, 1892	L. Jackson Lake Dewey, Buffington & Morgan, Trustees	Norwich, Conn.	10 100
First National Bank.	Norwich, Conn.	100	June	1, 1892	Frank S. Jerome	Southport, Conn.	14
Dewey, Bouve & Morgan, Trustees.		40	June	6, 1892	E. C. Sherwood, Ex'r Estate of Mrs. Abbie Martinson. Dewey, Buffington & Morgan, Trustees		26 10
Fuller, Rob't B.	Birmingham, Conn.	10	Sept.	5, 1892	Luther Fuller	1613 Florida Ave., Washington, D. C.	23
Fuller, Rob't B.	Birmingham, Conn.	23	Sept.	5, 1892	Luther Fuller	1613 Florida Ave., Washington, D. C.	20
Dewey, Bouve & Morgan, Trustees.		98	Oct.	1, 1892	Mrs. Maurice Wakeman Mrs. W. B. Van Wagener* Dewey, Buffington & Morgan, Trustees	Southport, Conn. Southport, Conn.	20 58 100
Dewey, Hersey & Morgan, Trustees.		220	Nov.	1, 1892	Julius Kohn The Minnesota Commercial Co. David Bankhead	44 Broad St., N. Y. Stillwater, Minn. Pelham, N. Y.	120 50 50
Dewey, Hersey & Morgan, Trustees.		100	Nov.	5, 1892	Dewey, Buffington & Morgan, Trustees Isaac Bernheimer Simon Bernheimer Dewey, Buffington & Morgan, Trustees	320 Broadway, N. Y. 320 Broadway, N. Y.	200 200 200
Dewey, Hersey & Morgan, Trustees.		600	Dec.	7, 1892			

* Nee Virginia D. Wakeman.

Statement Showing Transfers of Common Stock—Continued.

Name.	Address.	No. shares.	When transferred.	To whom transferred.	Address.	No. shares.
				Sarah M. Bailey (Lucy Geer, Executrix).	Norwich, Conn.	40
				Ellen Geer	Norwich, Conn.	90
				Lucy Geer	Norwich, Conn.	90
				Fred L. Geer	Albany, N. Y.	6
Dewey, Hersey & Morgan, Trustees		530	Dec. 16, 1892	Arthur H. Geer	Albany, N. Y.	4
				Robert Geer	Albany, N. Y.	70
				Abby Geer	Norwich, Conn	20
				Geo. B. Bonton, M. D.	Westport, Conn.	100
				Modora H. Morgan	Bridgeport, Conn.	10
Dewey, Bouve & Morgan, Trustees		100	May 6, 1893	Dewey, Buffington & Morgan, Trustees		100
Banks Estate, Ebenezer Burr, Trustee.	Bridgeport, Conn.	20	June 5, 1893	Dewey, Buffington & Morgan, Trustees		160
				Ebenezer Burr, Trustee of Estate of David Banks.	Bridgeport, Conn.	20
				John Griffin	Newtown, Conn., P. O. Cold Springs.	50
Dewey, Hersey & Morgan, Trustees		231	June 5, 1893	Geo. Griffin	Newtown, Conn., P. O. Cold Springs.	20
				Bruce N. Griffin	Shelton, Conn.	120
				Marshall H. Sears	Newtown, Conn	10
				Dewey, Buffington & Morgan, Trustees		31
				Mrs. Ellen A. Bowers	Clinton, Mass.	20
				Mrs. Abbie T. Frost	Fitchburg, Mass.	10
				Roger P. Frost	Fitchburg, Mass.	20
				Mary J. N. Fairbanks†	Fitchburg, Mass.	100
				Sarah D. Fiske	Hingham, Mass.	2
				Mrs. E. A. Wilkins	Westport, Conn	6
				Amelia R. Nash	Westport, Conn	6
				Mary A. E. King	No. Leominster, Mass.	20
				The Minnesota Commercial Co.	Stillwater, Minn.	400
				Alfred T. Goodsell	Westport, Conn	12
				Armenia H. Simmons	Bridgeport, Conn.	80
Dewey, Bouve & Morgan, Trustees.		900	Sept. 12, 1893	Andrew B. Curtis	Stepney Depot, Conn.	20
				Susan B. Butters	469 Westford St., Lowell, Mass.	10
				Mary A. Toucey, Alfred B. Beers, Att'y for Executrix.	Bridgeport, Conn.	10
				Mrs. Sarah J. Philipps, now Mrs. Sarah J. Cook.	50 Nassau Street, Fitchburg, Mass.	10
				James A. Neally	Providence, R. I.	20
				Celia Curtis	Stratford, Conn.	14
				Mrs. Martha R. Hillman	Barre, Mass.	20
				Mrs. Mary E. Gibbs	60 Erskine Street, Detroit, Mich.	100
				W. H. Millard	Delhi, N. Y.	20

† Walter A. Fairbanks, Exec.

Dewey, Hersey & Morgan, Trustees	1,200	Sept.	13, 1893	The Minnesota Commercial Co.	Stillwater, Minn.	1,200
126				O. H. Lawrence	Fitchburg, Mass	35
				Emily Beers	Southport, Conn	10
				Phebe Somers	Leominster, Mass	20
				Daniel Nash	Norwalk, Conn.	10
Dewey, Hersey & Morgan, Trustees	694	Sept.	13, 1893	Eunice Jennison	Fitchburg, Mass.	24
				Emily Booth	Stratford, Conn.	5
				Geo. H. Cutler	Fitchburg, Mass.	70
				Tarrant Cutler	Fitchburg, Mass.	100
				Edmund Rice, Jr.	Olympia, Washington	400
				Chas. W. Nource	Marlboro, Mass.	20
				Wilbur A. Gleason	Bridgeport, Conn.	4
				Mary F. Daniels	Fitchburg, Mass.	20
				Geo. F. Daniels	Fitchburg, Mass.	20
				Wm. M. Bright	Bangor, Me.	20
				Lovell Williams	Fitchburg, Mass.	100
				Eliza M. Jennings	Westport, Conn.	20
				C. C Stratton, Trustee	Fitchburg, Mass	50
				David B. Booth	Stratford, Conn.	20
				Mary A. Lacey	Plattsville, Conn.	20
				Eliza J. Murphy	265 East Main St, Bridgeport, Conn.	10
				Geo. H. Millard	Delhi, N. Y.	40
				Mrs. Adeline A. Prentiss	Windham, Vt.	16
Dewey, Hersey & Morgan, Trustees	535	Oct.	4 1893	Geo. A. Bright	Bangor, Me.	20
				Mary G. Bright	Bangor, Me.	11
				A. E. & J. M. B. Bright, Exc. Est. Jno. Bright	Bangor, Me.	20
				J. D. Littlehale, Executor	Fitchburg, Mass.	6
				W. F. Wilcox	Deep River, Conn.	20
				L. B. Cushing	Newburyport, Mass.	50
				Margaret W. Cushing	Newburyport, Mass.	10
				Fannie C Cushing	Newburyport, Mass.	10
				Ellen V. Hamlin	Bangor, Me.	12
				Chas. Hamlin	Bangor, Me.	12
				Hannibal E Hamlin	Ellsworth, Me.	12
				Frank Hamlin	107 Dearborn St., Chicago, Ill.	12
Dewey, Hersey & Morgan, Trustees	5	Oct.	4, 1893	Julia A. Holcomb	Bridgeport, Conn.	5
				The Minnesota Commercial Co	Stillwater, Minn.	200
				" " " "	Stillwater, Minn.	100
				" " " "	Stillwater, Minn.	100
				E. M. Littlefield	Pawtucket, R. I.	20
				The Minnesota Commercial Co.	Stillwater, Minn.	20
Dewey, Hersey & Morgan, Trustees	560	Nov.	28, 1893	Mary B. Tousey (Union Trust Co.), Executors.	So. Broadway, N. Y.	20
				Ella F. Pierce	No. Leominster, Mass.	20
				Geo. H. Turney	Birmingham, Conn.	10
				Mrs. Mary A. Breck	E. Somerville, Mass.	20
				Roderick P. Curtis	Bridgeport, Conn.	25
				Lewis B. Curtis	Bridgeport, Conn.	25

Statement Showing Transfers of Common Stock—Continued.

Name.	Address.	No. shares.	When transferred.	To whom transferred.	Address.	No. shares.
Dewey, Hersey & Morgan, Trustees		2,786	March 12, 1894	Mrs. E. H. Schenck	Care of Geo. Montague, Pres. 2d Nat'l Bank, N. Y.	10
				Charles W. B. Putnam, Adm.	Fitchburg, Mass.	160
				Mrs. S. J. Sawtelle	Care of H. E. Woods, Fitchburg, Mass.	15
				Nettie S. Childs	Care of Ruthven Childs, Hillsboro, N. H.	20
				Anna G. P. Rodman	1081 Chapel Street, New Haven, Conn.	10
				Julia C. Schenk, Executrix	Care of W. W. Keen, Philadelphia, Pa.	80
				Esther L. Curtis	157 E. Main Street, Bridgeport, Conn.	10
Schenck, Julia C., Executor	Care W. W. Keen, Philadelphia, Pa.	80	March 25, 1894	Dewey, Buffington & Morgan, Trustees		2,481
				The Minnesota Commercial Co.	Stillwater, Minn.	80
Dewey, Hersey & Morgan, Trustees		7,987	June 6, 1894	The Minnesota Commercial Co.	Stillwater, Minn.	78
				Esther L. Curtis	Bridgeport, Conn.	5
Haskell, Mary A. By Chas. A. Swan, Adm.	Clinton, Mass.	16	Aug. 3, 1894	Dewey, Buffington & Morgan, Trustees		7,704
				Eunice H. Haskell	Clinton, Mass.	10
127						
Dewey, Buffington & Morgan, Trustees		160	Oct. 18, 1894	C. E. Griffing, Adm. of Andrew Northrup.	Danbury, Conn.	30
				C. E. Griffing, Adm. of Kate M. Northrup.	Danbury, Conn.	10
				Dewey, Buffington & Morgan, Trustees		120
				David Tozer	Stillwater, Minn.	150
				Victor Brett, Administrator	Bangor, Me.	25
				The Minnesota Commercial Co.	Stillwater, Minn.	60
				Samuel T. Rogers	166 John Street, Bridgeport, Conn.	32
Dewey, Buffington & Morgan, Trustees		2,481	Nov. 5, 1894	M. Effie Glover	Danbury, Conn.	10
				Betsey A. Glover	Danbury, Conn.	10
				M. Elizabeth Glover	Danbury, Conn.	10
				Jerome Orcutt	Bridgeport, Conn.	10
				Andrew B. Sherman	Fitchburg, Mass.	100
				L. C. Tyler, Trustee	Bangor, Me.	8
				Clark B. Cochrane	Antrim, N. H.	10
				Dewey, Buffington & Morgan, Trustees		2,096

Dewey, Buffington & Morgan, Trustees.		351	Dec.	26, 1894	Julia F. Jessup	Southport, Conn.	25
					Henry R. Tracy	16 Worcester Square, Boston, Mass.	100
					Isabella M. Tracy	Chautauqua, N. Y.	20
					Louis N. Booth	Bridgeport, Conn.	25
					Emeline Dibble	Bridgeport, Conn.	28
					Letitia G. Chandler	Detroit, Mich.	60
					Mary E. Hale	Ellsworth, Me.	60
					Jno. F. Slater	Bangor, Me.	10
					Mary B. Glover	Newtown, Conn.	20
Dewey, Buffington & Morgan, Trustees.		100	Dec.	27, 1894	Dewey, Buffington & Morgan, Trustees		3
					Geo. N. Proctor	Fitchburg, Mass.	100
					Chas. G. Sanford	Bridgeport, Conn.	50
					Carrie G. Clark Paret	La Conca Verde, near Stroudsburg, Pa., Monroe Co., Box 516.	40
Dewey, Buffington & Morgan, Trustees.		120	Dec.	27, 1894			
					Benjamin A. Bulkley	Southport, Conn.	20
					Caleb C. Lowell	Bangor, Me.	19
					A. D. S. Bell	Equitable Bld., Boston.	480
Dewey, Buffington & Morgan, Trustees.		2,056	Feb.	12, 1895	Dewey, Buffington & Morgan, Trustees		1,576
					James L. Gould	295 Fairfield Ave., Bridgeport, Conn.	20
Dewey, Buffington & Morgan, Trustees.		30	April	22, 1895			10
					Dewey, Buffington & Morgan, Trustees		20
Littlefield, E. N.	Pawtucket, R. I.	20	May	13, 1895	Ida B. Littlefield	41 Wolcott Street, Pawtucket, R. I.	
					Rhode Island Society of Cincinnati	Wm. Delion King, Treasurer, Sandwich, Mass.	8
Dewey, Buffington & Morgan, Trustees.		58	June	10, 1895			50
					Dewey, Buffington & Morgan, Trustees		45
					The Fitchburg Home for Old Ladies	Fitchburg, Mass.	5
Dewey, Buffington & Morgan, Trustees.		50	July	8, 1895	Dewey, Buffington & Morgan, Trustees		30
Lake, D. Jackson.	New Haven, Conn.	30	Nov.	4, 1895	Catherine L. Lake	137 College Street, New Haven, Conn.	
					Joseph Weisbach	Boston, Mass.	480
Bell, A. D. S.	Boston, Mass.	480	Jan.	15, 1896	James N. Castle	Stillwater, Minn.	150
Tozer, David	Stillwater, Minn.	150	June	18, 1896	Susan N. Glover	Bridgeport, Conn.	20
Dewey, Buffington & Morgan, Trustees.		26	Feb.	20, 1897	Dewey, Buffington & Morgan, Trustees		6
					Henry H. Nourse	Marlboro, Mass.	20
Dewey, Buffington & Morgan, Trustees.		27	March	15, 1897	Dewey, Buffington & Morgan, Trustees		7
					Mrs. Julia V. Baker	Antrim, N. H.	6
Dewey, Buffington & Morgan, Trustees.		10	June	23, 1897	Dewey, Buffington & Morgan, Trustees		4
Bacon, Geo. Norval	Fiskdale, Mass.	10	Feb.	24, 1898	Jennie M. Bacon	Fiskdale, Mass.	10
Geo. M. Hitchcock, Adm.							
Ayer, Mrs. Mary A.	Boston, Mass.	7	March	21, 1898	Lemuel Bourne	Amboy, Ill.	6
Jas. P. Ayer, Executor.							
Ayer, Mrs. Mary A.	Boston, Mass.	4	March	21, 1898	James B. Ayer	53 Mount Vernon St., Boston.	5
Jas. P. Ayer, Executor.							
128					Daniel C. Nash	Norwalk, Conn.	50
Nash, Andrew C.	Westport, Conn.	200	Nov.	17, 1898	Edward A. Nash	Westport, Conn.	50
Dan'l C. Nash, Edward A. Nash, } Ex'rs.					Mrs. E. A. Wilkins	Westport, Conn.	50
					Mrs. Amelia R. Nash	Westport, Conn.	50

Statement Showing Transfers of Common Stock—Continued.

Name.	Address.	No. shares.	When transferred.	To whom transferred.	Address.	No. shares.
Cutler, Tarrant	Fitchburg, Mass.	100	Nov. 28, 1898	Mary E. Cutler	Fitchburg, Mass.	50
Clark A. Batchelder, Geo. H. Cutler, } Admr.				Geo. H. Cutler	Fitchburg, Mass.	50
Lincoln, Henry	Scotland, Conn.	20	April 14, 1899	Eva V. Dewing	Goldengate, Alameda Co., California.	20
By Flora J. Lyons, Admx.						
Thompson, E. R.	Norwich, Conn.	100	Nov. 15, 1899	Corinne B. Bidwell	Collinsville, Conn.	100
By O. E. Beckwith, Adm.						
Seaver, A. W.	Northboro, Mass.	27	Nov. 28, 1898	L. Holbrook, Executor, Estate of Susan H. Gale.	Box 536, New York	27
Att'y for Susan H. Gale by Anna M. Seaver, Executrix for A. W. Seaver.						
Comstock, S. G.	Moorehead, Minn.	60	Dec. 3, 1900	The Minnesota Commercial Co.	Stillwater, Minn.	60

129 EXHIBIT "B."

Name.	Amount.	Date from which interest is to be added.	
Elmer P. Howe, Boston, Mass.	$2,352.59	Aug. 9, 1901.	Note.
E. D. Buffington, Stillwater, Minn.	65,725.50	Apr. 3, 1901.	Judgment.
National State Capitol Bank, Concord, N. H.	16,811.39	Apr. 3, 1901.	Judgment.
Massachusetts Loan & Trust Company, Boston, Mass.	111,386.46	Apr. 15, 1901.	Judgment.
Freeman's National Bank, Boston, Mass.	1,236.50	May 16, 1901.	Judgment.
W. G. Bronson, Stillwater, Minn.	9,130.25	July 12, 1901.	Judgment.
A. T. Jenks, Stillwater, Minn	4,378.90	May 6, 1901.	Judgment.
American Loan & Trust Co., Boston, Mass.	2,340 00	Sept. 28, 1901.	Note.
L. C. Hyde *et al.*, exec., Boston, Mass.	126,937.75	Apr. 3, 1901.	Judgment.
Loan & Trust Saving Bank, Concord, N. H.	2,250 00	March 16, 1901.	Note.
Winchester National Bank, Winchester, N. H.	4,005.57	March 27, 1901.	"
National Revere Bank, Boston, Mass.	2,086.20	Oct. 8, 1900.	"
Manufacturers' National Bank, Boston, Mass.	283.50	Nov. 27, 1900.	"
Dime Savings Bank, Norwich, Conn.	556.20	March 19, 1900	"
E. A. Norcross, Fitchburg, Mass.	9,500.00	June 8, 1900.	"
First National Bank of Norwich, Norwich, Conn.	1,683.00	Aug. 6, 1900.	"
A. G. Folsom, Laconia, N. H.	216.00	Sept. 9, 1900.	"
M. F. Dickinson, Boston, Mass.	540.00	Mar. 7, 1900.	"
M. E. Gibbs, Detroit, Mich.	288.90	March 3, 1900.	"
National Grand Bank of Marblehead, Mass.	1,063.96	Since the date of intervention.	"
W. H. Lightener, receiver, St. Paul, Minn.	1,050.00	Dec. 6, 1900.	"
Lawrence National Bank, Lawrence, Mass.	2,105.90	Aug. 20, 1900.	"
Wachusett National Bank, Fitchburg, Mass.	12,035.05	Since the date of intervention.	"
Gustav Willius, receiver, St. Paul, Minn.	825.00	Since the date of intervention.	"
Merchants' National Bank, St. Paul, Minn.	2,938.07	May 6, 1901.	Judgment.
	$381,725.79		

130 EXHIBIT "C."

Names.	Amount.	Date from which interest is to be added.
John Hancock National Bank, Springfield, Mass.	$278.16	11/27/1900.
L. H. Goodnow, Fitchburg, Mass.	634.50	11/27/1900.
John S. Blodgett, Concord, N. H.	180.00	11/27/1900.
Benj. L. Bartlett, E. Deering, N. H.	422.00	3/22/1900.
Wm. S. Williams, Glastonbury, Conn.	288.90	4/2/1900.
Emery L. Bates, Fiskdale, Mass.	569.70	4/20/1900.
First National Bank of Oxford, N. Y.	1,073.14	12/20/1900.
Jersey Shore Banking Company, Jersey Shore, Pa.	278.10	12/20/1900.
Merchants National Bank, Norwich, Conn.	1,063.96	8/20/1900.
Mrs. Louvan C. Hyde, Boston, Mass.	540.00	4/6/1900.
Blackstone National Bank, Boston, Mass.	2,086.20	8/27/1900.
First National Bank, Provincetown, Mass.	1,046.72	9/15/1900.
Bristol County National Bank, Taunton, Mass.	467.10	9/21/1900.
Gloucester National Bank, Gloucester, Mass.	278.10	10/10/1900.
Northboro National Bank, Northboro, Mass.	536.73	10/10/1900.
Mechanic's National Bank, New Bedford, Mass.	2,155.26	4/10/1901.
Old Colony National Bank, Plymouth, Mass.	5,131.86	4/10/1901.
A. D. Putnam, Esq., Danielson, Conn.	359.07	4/10/1901.
Charles P. Backus, Danielson, Conn.	359.07	4/10/1901.
C. S. Burlingame, Danielson, Conn.	359.07	4/10/1901.
Monument National Bank, Charlestown, Mass.	230.00	12/13/1900.
Belknap Savings Bank, Laconia, N. H.	5,100.00	
Bristol County Savings Bank, Taunton, Mass.	14.01	9/15/1900.
Accounts.		
William M. Mason, Boston, Mass.	19.23	
Francis A. Osborn, Boston, Mass.	208.33	
	$23,679.15	

131 I. Simon Bernheimer died in the City of New York, on April 26, 1900, leaving property in the State of Minnesota, and leaving a Last Will, which was admitted to probate in the office of the Surrogate of the County of New York, having jurisdiction of the same on May 18th, 1900; and letters testamentary were thereupon issued to these defendants, who duly qualified thereunder and still remain such Executors.

The said Will of Simon Bernheimer was duly proved and recorded in the probate Court of the County of Ramsey, in the State of Minnesota, having jurisdiction of the same, and Letters Testamentary were thereupon duly issued by such Court to Jacob S. Bernheimer and Mayer S. Bernheimer, who duly qualified thereunder, which letters were issued on September 7th, 1900. The said Jacob S. Bernheimer died on April 27, 1902, and the said Mayer S. Bernheimer still remains as such Executor.

On September 7th, 1900, the following order was duly made by the Probate Court of the County of Ramsey:

In Probate Court.

STATE OF MINNESOTA, *County of Ramsey*, ss:

In the Matter of the Estate of SIMON BERNHEIMER, Deceased.

Letters Testamentary on the Estate of Simon Bernheimer, deceased, late of the City and County of New York and State of New York, being granted to Mayer S. Bernheimer, and Jacob S. Bernheimer,

It is ordered that six months be and the same is hereby allowed from and after the date of this Order in which all persons having claims or demands against the said deceased are required to file the same in the Probate Court of said County for examination and allowance, or be forever barred,

It is further ordered, *at* the first Monday in April, 1901, at 10 o'clock A. M., at a General Term of said Probate Court to be
132 held at the Court House, in the City of St. Paul, in said County, be and the same here is appointed as the time and place when and where the said Probate Court will examine and adjust said claims and demands.

And it is further ordered, that notice of such hearing be given to all creditors and persons interested in said Estate by forthwith publishing this Order once in each week for three successive weeks in the St. Paul Dispatch, a daily newspaper printed and published in said County.

Dated, at St. Paul, this 7th day of September, 1900.

By the Court:

E. W. BAZILLE,
Judge of Probate.

[L. S.]

HADLEY & ARMSTRONG,
Att'ys for Executors.

The notice required by the said order was duly published.

On March 23rd, 1903, the following decree was duly made by the said Probate Court of Ramsey County:

In Probate Court.

Special Term, March 23, 1903.

"STATE OF MINNESOTA, *County of Ramsey*, ss:

In the Matter of the Estate of SIMON BERNHEIMER, Deceased.

It appearing to the Court here, on satisfactory proofs and the evidence, that the funeral charges, expenses of last sickness of said deceased, and the cost of administration of said estate, have been fully paid, and that all debts existing against said deceased, or

allowed by the Court pursuant to law, as well as the specific legacies of personal property made by the will of said deceased, have also been fully paid and satisfied, and that the said estate has been fully administered, as by the final account of Mayer S. Bernheimer, as surviving executor of the last Will and Testament of said deceased, duly admitted and allowed by this Court, pursuant to due notice given and served will appear, reference being had thereto.

133 And it further appearing, that due notice of the application for this final decree in said matter, assigning the estate to the person thereto entitled by law, has likewise been duly given and served pursuant to the law in such case made and provided and decided;

And it further appearing that said deceased died testate, and that the residue of said estate consists of the following described real estate, to wit:

(Here follows description of real estate owned by said Simon Bernheimer in Minnesota.)

And it further appearing that by the terms of his last will and testament said Simon Bernheimer devised all the rest and residue of his property and estate, including his interest in the real estate above described to his sons Jacob S. Bernheimer, Mayer S. Bernheimer, and Lorin S. Bernheimer, the survivor or survivors of them, upon the conditions and subject to the trusts as in said last will and testament set forth and expressed.

And it further appearing that said Jacob S. Bernheimer one of the said trustees departed this life on the 27th day of April, 1902, and that said Mayer S. Bernheimer and Lorin S. Bernheimer are the surviving trustees and devisees named in and appointed by said will and testament;

Now therefore, on the petition of said surviving executor, and pursuant to due notice and the law in such case provided,

It is ordered, adjudged and decreed, and this Court by virtue of the power and authority vested in the same by law doth hereby order, adjudge and decree, that all and singular of the above described real and personal estate, and all other the estate of said deceased in the State of Minnesota be, and the same is hereby assigned to and vested in the said Mayer S. Bernheimer and Lorin S. Bernheimer, as trustees upon the condition and subject to the trusts expressed in the last Will and Testament of said Simon Bernheimer, deceased, which will has been heretofore allowed by and admitted to probate in this Court; without prejudice however, to any lawful conveyance of said real estate or any part thereof by said persons or any of them as executor or trustees.

To have and to hold the same, together with all the hereditaments and appurtenances thereunto belonging or in any wise appertaining, to the above named persons and their survivors, successors and assigns forever.

By the Court,

EDMUND M. BAZILLE,

[L. S.] *Judge of Probate, Ramsey Co., Minn.*

Dated, June 30, 1903.

134 II. That Simon Bernheimer for many years prior to his death, and these defendants, at all of the times mentioned in the complaint, and for many years prior thereto were residents of the State of New York, and that neither said Simon Bernheimer nor any of these defendants had ever resided in the State of Minnesota, nor been served with process therein.

That no claim or demand upon the cause of action alleged upon the complaint, or upon any of the claims of causes of action to satisfy which the assessment of the shareholders of said Minnesota Thresher Manufacturing Company was made, nor any claim upon any liability of the said Simon Bernheimer as a stockholder of said Minnesota Thresher Manufacturing Company, was ever presented within the time fixed in the said order for creditors to present claims, or at any time to the said Probate Court or to any Probate Court, or to these defendants or to any of them.

III. That in none of the actions or proceedings had in the State of Minnesota was any notice or process in the name or address of these defendants either individually or as Executors ever issued or served, or published, either in the State of Minnesota, or elsewhere; but the notices of the proceedings herein referred to were mailed by the Receiver, addressed to Simon Bernheimer, 320 Broadway, New York City, that being his address on the books of the Minnesota Thresher Manufacturing Company/ that the receiver did not know of the death of Simon Bernheimer or of his will, until after the mailing of said notice and shortly before the commencement of this action.

135 **Names and Residences of All Persons Claiming to be Creditors of the Minnesota Thresher Manufacturing Company on August 16, 1901, Whose Claims were Presented to and Allowed by the Supreme Court of Minnesota in the Assessment Proceeding and Nature of their Claims.**

Notes.

Name.	Address.	Date.	Date int. paid to.	Am't of note.
Manufacturers' Nat. Bk.....	Boston, Mass.....	11-27-98	11-27-00	283.50
John Hancock Nat. Bk.....	Springfield, Mass.	3- 7-00	With Int.	278.10
L. H. Goodnow.....	Fitchburg, Mass..	"	"	634.50
T. S. Kirkwood.....	Chicago, Ill.....	"	"	1,800.00
Elmer P. Howe.....	Boston, Mass	3-16-00	"	360.00
M. F. Dickinson, Jr., 53 State Street.	"	3- 7-00	"	540 00
Loan & Trust Sav. Bk.....	Concord, N. H...	3-16-00	"	2,250.00
Dime Savings Bank.....	Norwich, Conn .	"	"	556.20
John S. Blodgett, c. o. Nat. St. Cap. Bk.	Concord, N. H...	3-21-00	"	180 00
Mrs. Mary E. Gibbs, 60 Erskine St.	Detroit, Mich....	3-22-00	....	288.90
Benj. L. Bartlett.....	E. Deering, N. H.	"	.....	422.10
Wm. S. Williams.....	So. Glastonbury, Conn.	4- 2-00	"	288.90
Mrs. Lowan C. Hyde, Exchange Bldg.	Boston, Mass.....	4- 6-00	"	540.00
Est. of Henry D. Hyde, Exchange Bldg.	"	"	"	900.00
Emery L. Bates.....	Fiskdale, Mass...	4-20-00	"	569.70
Amer. Loan & Trust Co.....	Boston, Mass	5-26-00	9-26-00	2,340.00
Nat. Revere Bank.	Boston, Mass ...	6- 8-00	10- 8-00	2,086.20

	Name.	Address.	Date.	Date int. paid to.	Am't of note.
	Wachusett Nat. Bank	Fitchburg, Mass.	7-30-00	11-30-00	2,250.00
	" "	" "	7-14-00		
	" "	" "	(Bal.)	11-14-00	9,012.50
	" "	" "	7-14-00	With Int.	209.00
	" "	" "	7-30-00	"	45.00
	First Nat. Bank	Norwich, Conn.	8- 6-00	12- 6-00	1,650.00
	" "	" "	"	With Int.	33.00
	" "	Oxford, N. Y.	8-20-00	12-20-00	1,052.10
	" "	" "	"	With Int.	21.04
	Lawrence Nat. Bank	Lawrence, Mass.	"	12-20-00	2,064.60
	" "	" "	"	With Int.	41.30
	Jersey Shore Banking Co	Jersey Shore, Pa.	"	12-20-00	278.10
	Merchants' Nat. Bank	Norwich, Conn.	"	"	1,043.10
	" "	" "	"	With Int.	20.86
	Nat. Grand Bank	Marblehead, Mass.	"	12-20-00	1,043.10
	" "	" "	"	With Int.	20.86
	Blackstone Nat. Bank	Boston, Mass	12-26-99	18-27-00	2,086.20
	First Nat. Bank	Provincetown, Mass.	9-10-00	With Int.	1,016.10
	" "	"	9-15-00	"	30.32
	Bristol Co. Nat. Bk	Taunton, Mass.	9-21-00	"	467.10
	Winchester Nat. Bk.	Winchester, N. H.	9-27-00	3-27-01	3,886.90
	" "	" "	9-15-00	With Int.	116.67
	Forward				$40,699.45
136	Forward total am't of judgments				337,451.91
	Forward				40,699.45
	Gloucester Nat. Bank	Gloucester, Mass.	10-10-00	With Int.	270.00
	" "	" "	"	"	8.10
	Northborough Nat. Bank	Northboro, Mass.	"	4-10-01	521.10
	" "	" "	"	With Int.	15.63
	Mechanics' Nat. Bank	New Bedford, Mass.		4-10-01	2,092.50
	" "	" "		With Int.	62.76
	Old Colony Nat. Bank	Plymouth, Mass.	"	4-10-01	4,982.40
	" "	" "	"	With Int.	149.46
	A. G. Folsom	Laconia, N. H.	9-21-00	"	209.70
	" "	" "	9-15-00	"	6.50
	A. D. Putnam	Danielson, Conn.	10-10-00	4-10-01	348.60
	" "	" "	"	With Int.	10.47
	Chas. P. Backus	" "	"	4-10-01	348.60
	" "	" "	"	With Int.	10.47
	C. S. Burlingame	" "	"	4-10-01	348.60
	" "	" "	"	With Int.	10.47
	Amasa Norcross Est.	Fitchburg, Mass.	7- 1-93	1- 1-01	10,000.00
	Bank of Minnesota	St. Paul, Minn.	12- 7-96	12- 5-00	1,050.00
	Germania Bank	" "	4- 1-99	11-22-00	825.00
	Monument Nat. Bank	Charlestown, Mass.	7-20-00	With Int.	230.00
	Belknap Savings Bank	Laconia, N. H.	8-13-00	12-13-00	5,000.00
	" "	" "	"	With Int.	100.00
	Bristol Co. Sav. Bank	Taunton, Mass.	9-15-00	"	14.01
					67,313.62

Accounts for Salaries and Expenses.

Name.	Address.	
Wm. M. Mason	520 Tremont Bldg., Boston, Mass.	19.23
Francis A. Osborn	43 Milk St., " "	208.33
E. D. Buffington	Stillwater, Minn.	192.30
		419.86
Grand total		405,185.39

137 The following is a list of the notes upon which the above judgments were rendered:

Name of payee.				
E. D. Buffington	Jan. 5, 1900,	$18,990.00	Int. p'd to Sept. 1, 1900,	
	" " "	35,000.00	" " " July 1, "	
	" "	35,000.00	" " April 1, "	
			and 30,729.17 on principal.	
	Feb. 1, 1900,	4,500.00	Int. p'd to May 1, 1900	
	June 4, 1900	5,000.00	" " Oct. 4 "	
			1,382.50 on principal Nov. 14, 1900	
Nat'l State Capital Bank of Concord, N. H.	July 5, 1900,	1,000.00	Int. p'd to Nov. 5, 1900	
	" 10, 1900,	2,500.00	" " " 18, "	
	Aug. 13, 1900,	5,000.00	" " Dec. 13, "	
	" " "	100.00		
Lowan C. Hyde, Benj. D. Hyde, Ex'rs Est. Henry D. Hyde.	April 26, 1900	4,123.80	" " Aug. 27 "	
	July 17, 1893,	15,000.00	" " April 1, "	
	July 24, 1893,	15,000.00	" " " "	
	Jan. 1, 1894,	5,000.00	" " " "	
	Jan. 4, 1897,	12,500.00	" " " "	
	Jan. 5, 1897,	12,500.00	" " " "	
	Jan. 12, 1897,	25,000.00	" " Dec. 31 "	
	Jan. 6, 1897	12,500.00	" " Sept. 30, "	
	Jan. 6, 1897	12,500.00	" " " "	
	Feb. 1, 1897,	10,000.00	" " Nov. 6 "	
	July 6, 1900,	200.00	" " Oct. 1, "	
Mass. Loan & Trust Co.	Feb. 2, 1897,	122,500.00	Int. p'd to Aug. 31, 1900	
			13,306.95 on prin. Dec. 21, 1897,	
			11,948.75 on prin. Nov. 30, 1900,	
Merchants' Nat'l Bank	March 23, 1896,	9,000.00	Int. p'd to Aug. 31, 1890	
Freeman's Nat'l Bank	Nov. 1, 1900,	2,900.00	" " M'ch 4, 1901.	
A. T. Jenks	Aug. 20, 1900,	1,200.00	" " Dec. 29, 1900.	
W. G. Bronson	Feb. 14, 1898,	4,162.00	" " Aug. 27, "	
	Jan. 30, 1899,	2,600.00	" " Oct. 1, 1899	
	Jan. 30, 1899,	6,168.69	" " Aug. 1, 1900,	

The plaintiff will furnish a statement of the due dates of the notes above mentioned and of any notes of which these are renewals, so far as these dates are shown by the books and records of the Minnesota Thresher Company in the possession of the receiver.

WILSON & WALLIS,
Plaintiff's Attorneys.
JACOB & TANZER,
Def'ts' Att'ys.

[Endorsed:] Wilson & Wallis, Plaintiff's Attorneys. Jacob & Tanzer, Def'ts' Att'ys.

138 Counsel for the plaintiff produces letter of the plaintiff containing a statement of the matters referred to in the closing paragraph of the stipulation, Defendant's Exhibit 1, to wit: a statement of the due dates of the notes mentioned in the stipulation and of the notes of which they are renewals so far as those dates are shown by the books and records of the Minnesota Thresher Manufacturing Company, in the possession of the Receiver, and Defendant's counsel offers the same in evidence.

Mr. WILSON: Counsel for plaintiff objects, not on the score of incompetency, but merely on the ground of irrelevancy and immateriality; in other words, the document is admitted as sufficient proof of the facts that it states, without question.

Objection overruled.

Marked Defendant's Exhibit 2, and is as follows:

139 Office of Theodore R. Converse, Receiver Minnesota Thresher Manufacturing Co., Stillwater, Minnesota.

MAY 25, 1905.

Mr. George E. Coney, Attorney at law, 48 Wall St., New York.

MY DEAR MR. CONEY: On the 20th inst. I received from Mr. Severance the memorandum you sent him, which I return herewith, covering the list of notes upon which judgments were rendered, with the request that I send you the information referred to on same in order that you might put it in the stipulation. Owing to Mr. Buffington's absence from his office, it has been impossible to find the data giving a full history of these judgment notes, but as he has informed me that practically the same information that you need was sent to Mr. B. D. Hyde, of Boston, by Mr. Severance, I herewith enclose a copy of the letter written by Mr. Severance June 4th, 1904, which I think will answer the requirements as well as afford any additional information as regards the notes in favor of other creditors, which may be of possible service to you some time.

Referring to your memorandum, I would further add that all the notes against which I have marked a "D" are demand notes, and the *due dates* on the balance correspond to the various dates noted to which interest has been paid, with the following exceptions:

140 The two notes of $12,500 each, dated January 6th, 1897, in favor of the Hyde Estate, fell due on September 30th, 1899, instead of 1900; and the due date of the Freemans National Bank note should be December 23rd, 1900, rather than December 29th.

Further, the note in favor of the Massachusetts Loan & Trust Company, dated February 2nd, 1897, for $122,500 runs for two months, and the due date would accordingly be April 2nd, 1897.

I note further what is apparently a slight error in the date of the $2500 note in favor of the National State Capital Bank of Concord, New Hampshire. You have it as July 19th, and I think it should be July 18th, as you will see that this corresponds with the due date of November 18th, four months thereafter.

I believe this information will suffice, but if not, please call on me further. I am very glad to learn that there is a possibility of settling the Breslin and Cannon claim.

You have doubtless heard through Mr. Severance of the substantial progress Mr. Buffington is making toward recovery, for which we are very thankful. He is contemplating a trip to Connecticut with me next month, to testify in two of our cases there.

Very truly yours, T. R. CONVERSE.

Enclos.

141 The following is a list of the notes upon which the above judgments were rendered:

Name of payee.		Date of note.	Amount.	
E. D. Buffington	1	Jan. 5, 1900,	$1,590.00 D.	Int. pd. to Sept. 1, 1900.
	2	" "	35000.00 D.	" " " July 1, "
	3	" "	35000.00 D.	" " " April 1, " and 30,729.17 on principal.
	4	Feb. 1, 1900,	4500.00 D.	Int. pd. to May 1, 1900.
		June 4, 1900,	5000.00	" " " Oct. 4, " 1,332.50 on principal Nov. 14, 1900.
Nat'l State Capital Bank of Concord, N. H.		July 5, 1900,	1000.00	Int. pd. to Nov. 5, 1900.
		" 10, 1900,	2500.00	" " " " 18, 1900.
		Aug. 13, 1900,	5000.00	" " " Dec. 13, "
		"	100.00 D.	
Lowan C. Hyde, Benj. D. Hyde, Ex'rs Est. Henry D. Hyde.		April 26, 1900,	4123.00	" " " Aug. 27, "
		July 17, 1893,	15000.00 D.	" " " April 1, "
		July 24, 1893,	15000.00 D.	" " " " " "
		Jan. 1, 1894,	5000.00 D.	" " " " " "
		Jan. 4, 1897,	12500.00	" " " " " "
		Jan. 5, 1897,	12500.00	" " " " " "
		Jan. 12, 1897,	25000.00	" " " Dec. 31, "
		Jan. 6, 1897,	12500.00	" " " Sep. 30, "
		Jan. 6, 1897,	12500.00	" " " " " "
		Feb. 1, 1897,	10000.00	" " " Nov. 6, "
		July 6, 1900,	200.00 D.	" " " Oct. 1, "
Mass. Loan & Trust Co.		Feb. 2, 1897,	122500.00	Int. pd. to Aug. 31, 1900. 13,306.95 on prin. Dec. 31, 1897. 11,948.75 on prin. Nov. 30, 1900.
		March 25, 1896,	9900.00 D.	Int. pd. to Aug. 31, 1900.
Merchants' Nat'l Bank		Nov. 1, 1900,	2000.00	Int. pd. to M'ch 4, 1901.
Freeman's Nat'l Bank		Aug. 20, 1900,	1200.00	" " " Dec. 29, 1900.
A. T. Jenks		Feb. 14, 1898,	4162.00 D.	" " " Aug. 27, "
W. G. Bronson		Jan. 30, 1899,	2600.00 D.	" " " Oct. 1, 1899.
		Jan. 30, 1899,	6165.00 D.	" " " Aug. 1, 1900.

The plaintiff will furnish a statement of the due date of the notes above mentioned and of any notes of which these are renewals, so far as these dates are shown by the books and records of the Minnesota Thresher Manufacturing Company in the possession of the Receiver.

142 JUNE 4, 1904.

In re Claims Against Minnesota Thresher Manufacturing Company.

B. D. Hyde, Esq., Boston, Mass.

DEAR BEN: The first claim is one of E. D. Buffington, this claim is made up as follows:

A note of $18,990 dated January 5, 1900, which was a renewal of another note dated October 5, 1899, also made to Buffington, which note in turn was a renewal, several payments thereon having been made in the meantime of a $21,100 note made the 8th of May, 1894, to the Tremont National Bank of Boston. The renewal of this $21,100 note was sold to Mr. Buffington sometime during the year 1899.

The second cause of action making up the claim of Mr. Buffington was a note for $35,000 given to him on January 5, 1900. This note was a renewal of one made October 5, 1899, for the same amount to Mr. Buffington, which in turn was the amount of a note of $35,000 given on June 3, 1893, to the Tremont National Bank of Boston, and renewed from time to time, the last renewal in the name of the Tremont Bank having been purchased by Mr. Buffington and the same renewed in his name as stated on October 5, 1899.

The third cause of action making up Mr. Buffington's claim is a note for $35,000, on which there was paid the sum of
143 $30,729.17 on January 20, 1900, and on which when his claim was interposed there was claimed and allowed the sum of $4,270.83 and interest from April 1, 1900, at the rate of 6% per annum. This $35,000 note had been made in the name of Mr. Buffington on the 5th of October, 1899, and the said amount of $35,000 was the sum of certain notes made to the said Tremont National Bank, as follows:

A note of $25,000, dated January 20, 1892, and renewed from time to time;

A note of $5,000, dated August 12, 1893, and renewed from time to time;

And another note of $5,000, dated August 30, 1899, and renewed from time to time; the said three notes culminating in a note of $35,000, which was in turn renewed into the note of that amount dated October 5, 1899, above referred to.

The last cause of action set up by Mr. Buffington in his intervening complaint is on a note of $4500, which was dated February 1, 1900, bearing 6% interest. This note was a renewal of a renewal of a certain note dated March 13, 1894, for $5,000 in favor of the Boston National Bank, on which last named note there had been, in the course of the renewals, certain payments aggregating $500, reducing the same to the sum of $4,500 at the time the last renewal was made to Mr. Buffington.

In addition to the foregoing there was included in the claim allowed to Mr. Buffington the following:

A certain judgment entered in favor of A. T. Jenks and against the Minnesota Thresher Manufacturing Company, on May 16, 1901, for $4,378.90. The note upon which this judgment was rendered was a renewal after several intermediate renewals
144 of a note of $10,000 given on the 16th of April, 1893, to the First National Bank of Stillwater, Minnesota, upon which payments had been made, reducing the same to the amount of $4,162, for which a note was given on the 27th of August, 1900, and the said judgment was the amount of that note with interest and costs. This judgment was sold and assigned to Mr. Buffington, and represents part of his claim as finally allowed.

In addition to this Mr. Buffington had a small claim for the balance of his salary as General Manager, Secretary and Treasurer of the Thresher Company, which aggregate $192.30; and the total amount for which Mr. Buffington's claim was allowed by the court

which included interest, was $77,168.33. This allowance was made on the 11th of December, 1902.

The next claim is that of the National State Capital Bank of Concord, New Hampshire, which was allowed $18,512.14, on the 11th of December, 1902. This is made up as follows:

A certain note of $5,000 dated June 4, 1900, which was a renewal, after several intermediate renewals of a note for the same amount dated July 3, 1893. There was paid on this $5,000 note the interest to October 4, 1900, and the sum of $1,382.50 on the 14th of November, 1900, and in the intervening complaint there was claimed the sum of $3,617.50 and interest on $5,000 from October 4, 1900 to November 14, 1900, and interest on $3,617.50 being the balance due after the payment November 14, 1900.

The next cause of action of this Bank was a note for $1,000 dated July 5, 1900, which was a renewal, there being several
145 intermediate renewals of a note for the same amount dated May 31, 1893. Upon this note of $1,000 the interest was paid up to November 5, 1900.

The next item in the claim of said Bank was a note for $2,500 dated July 18th, 1900, upon which the interest was paid up to the 18th of November 1900. This note of $2,500 was the balance due, after several successive renewals, of a note of $5,000 dated October 10, 1890, upon which various payments had been made, reducing the same to the sum of $2,500.

The next item included in this claim of the Bank was a note for $5,000, dated August 13, 1900, upon which interest had been paid up to the 13th of December, 1900. This note was a renewal, after several intermediate renewals, of a note for the same amount dated May 6, 1891.

The next cause of action was on a promissory note running to said Bank, dated August 13, 1900, for the sum of $100, which was given for interest due the said Bank on August 13, 1900.

The next note included in this claim was one of $4,123.80 dated April 26, 1900, upon which interest was paid to August 27th, 1900. This was a renewal, after several payments, of a certain note of $4,582 dated March 21, 1894. This latter note had been renewed from time to time and various payments had been made, reducing it to the sum included in the note of April 26, 1900.

The claim of the National State Capital Bank was allowed, with interest, at $18,512.14.

146 The next claim is that of the Executors of Henry D. Hyde. This claim was allowed, with interest, at $139,833.15, and was made up as follows:

Mr. Henry D. Hyde, or his Executors, took up a note of $15,000 in favor of the Massachusetts Loan and Trust Company, dated July 17th, 1893. The interest on this was paid from time to time up to April 1, 1900. Mr. Hyde was the endorser on this paper.

The next item in the claim of Mr. Hyde was a note for $15,000

running to said Henry D. Hyde, dated July 24, 1893, upon which the interest had been paid from time to time up to April 1, 1900.

The third cause of action was a note made by the Thresher Company to said Henry D. Hyde, on January 1, 1894, for $5,000, upon which interest had been paid up to April 1, 1900.

The fourth cause of action was a note of $12,500 made by the Thresher Company to the Central National Bank of Boston on the 4th of January, 1897, running to said Bank, which note was a renewal, after several intermediate renewals, of a note dated May 3, 1893, for the same amount. This note was *sold by* said Central National Bank to Mr. Hyde and the interest on it was paid up to the 1st of April, 1900.

The next item was another note of $12,500 dated January 5, 1897, made by the Thresher Company to said Central National Bank, upon which the interest was paid up to April 1, 1900, and which was a renewal, with several intermediate renewals, of a note given on June 5, 1893, to said Central National Bank.

147 This last note was assigned over to the estate of Mr. Hyde by said Bank after the death of Mr. Hyde.

The next cause of action was a note of $25,000 made by the Thresher Company on January 12, 1897, to the American Loan & Trust Company of Boston, upon which the interest was paid to December 31, 1900. This note was a renewal, there being several intermediate renewals, of a note for the same amount dated May 23, 1893.

The next cause of action was a note of the Thresher Company made on the 6th of January, 1897, to said American Loan & Trust Company for the sum of $12,500, upon which interest was paid to September 30, 1899, the said note, with some intermediate renewals, having originally been made on the 4th of April, 1893.

The next cause of action was another note of $12,500 made to the American Loan & Trust Company of Boston on the 6th of January, 1897, upon which the interest was paid up to September 30, 1899, which note was a renewal, after several intermediate renewals, dated the 22nd of April, 1893; the said last three notes having been assigned to the estate of Mr. Hyde.

The next cause of action was on a note for $10,000 made on the 1st of February, 1897, to the National Bank of North America, of Boston, Mass., which was sold to the estate of Mr. Hyde, and upon which the interest was paid to the 6th of November, 1900.

This note, with some intermediate renewals, originated on

148 September 1, 1893, in a note of the same amount to said Bank.

The last cause of action in favor of said Executors was a note of $200 made on the 6th of July 1900; the interest on it was paid to October 1, 1900. This note was made directly to the said Executors, and was not a renewal of any preceding note.

The next claim is that of the Massachusetts Loan & Trust Company. This was on a judgment which was obtained upon a note dated the 2nd day of February, 1897 for $122,500 with interest, upon which the sum of $13,306.95 was paid December 21, 1897, and the interest on said note was paid up to August 31, 1900, and the further

sum of $11,948.75 was paid on November 30, 1900; and in addition there was another note of $9,900 dated the 23rd of March, 1896, upon which the interest had been paid up to August 31, 1900. This $122,500 note was the aggregate of notes made back in 1893, which amounted to said sum; and the $9,900 note was the balance of a note for $11,000 made May 8, 1894.

This claim of the Massachusetts Loan & Trust Company, with interest, was allowed for $122,431.52.

The next claim is that of the Merchants' National Bank of St. Paul, *which was the judgment creditor* instituting the proceedings upon which the Receiver was appointed. Its claim was founded upon a note for $2,900 dated the 1st day of November, 1900. This note, upon which judgment was rendered, was the balance
149 due upon certain notes renewed from time to time, with payments, which notes originally amounted to $8,124.16, and were dated in June, 1892. The claim of the Bank was allowed at $3,219.14.

The next claim is that of the Freeman's National Bank of Boston, which was a note for $1,200 dated 20th of August, 1900, upon which interest was paid up to December 20, 1900. This note originated back in 1888 in a note of $5,000, which was renewed from time to time, payments being made until it eventually resulted in the $1,200 note mentioned. The claim of the Freeman's Bank was allowed at $1,352.72.

The next claim is that of W. G. Bronson. This was upon two notes, the first $2,600 dated 30th of January, 1899, the note being originally made to the Lumberman's National Bank of Stillwater, and assigned to Mr. Bronson. This was part of a note of $5,000 which was given March 27, 1893, upon which payments had been made from time to time, reducing it to the amount stated.

The second note included in Mr. Bronson's claim is for $6,168.69 dated January 30, 1899, which was part of a $10,000 note first given on March 14, 1893, and renewed from time to time with payments. Mr. Bronson's claim was allowed at $9,929.13.

150 The next claim is that of the Manufacturers' National Bank of Boston, Mass. This was upon a note for $283.50, dated November 27, 1898, with interest paid to November 27, 1900; this note was a renewal, with intermediate renewals and payments, of a note for $315 dated March 12, 1894. The claim of the Bank was allowed at $318.13.

The next claim is that of the John Hancock National Bank of Springfield, Mass. This was upon a note for $278.10 dated March 7, 1900, which note was a renewal with intermediate renewals, and payments, of a note for $309 dated March 12, 1894. The claim of this Bank was allowed at $324.10.

The next claim is that of Elmer P. Howe and consists of two notes, as follows:

A note of $1800 dated March 7, 1900, with interest in favor of T. S. Kirkwood, of Chicago, Ill., which note was a renewal with payments of a note for $2,000 dated May 18, 1894; this note was assigned to said Howe.

A note of $360 dated March 13, 1900, with interest, which note was a renewal with payments, of a note for $400 dated June 22, 1894. The claim of said Elmer P. Howe was allowed at $2,541.18.

The next claim is that of M. F. Dickinson, 53 State Street, Boston, Mass. This was upon a note for $540 dated March 7, 1900, with interest which note was a renewal with payments of a note
151 for $600 dated June 22, 1894. This claim was allowed at $639.37.

The next claim is that of the Loan & Trust Savings' Bank of Concord, New Hampshire. This was upon a note for $2,250 dated March 16, 1900, with interest, which note was a renewal with payments, of a note for $2,500 dated March 13, 1894. This claim was allowed at $2,619.

The next claim is that of the Dime Savings — of Norwich, Conn. This was upon a note for $556.20 dated March 16, 1900, with interest, which note was a renewal with payments, of a note for $618 dated March 13, 1894. This claim was allowed at $647.41.

The next claim is that of Mrs. Mary E. Gibbs, 60 Erskine Street, Detroit, Mich. This was upon a note for $288.90, dated March 22, 1900, with interest, which note was a renewal with payments, of a note for $321 dated March 16, 1894. This claim was allowed at $336.00.

The next claim is that of Benjamin L. Bartlett, E. Deering, New Hampshire. This was upon a note for $422.10 with interest, dated March 22, 1900, which note was a renewal with payments, of a note for $469, dated March 16, 1894. This claim was allowed at $490.89.

The next claim is that of Emery L. Bates, Fiskdale, Mass. This was upon a note for $569.70 dated April 20, 1900, with interest, which note was a renewal with payments, of a note for $633
152 dated March 30, 1894. This claim was allowed at $659.90.

The next claim is that of the American Loan & Trust Company of Boston, Mass. This was upon a note for $2,340 dated May 26, 1900, upon which interest was paid to September 26, 1900, which note was a renewal with payments, of a note for $2,600 dated June 1, 1894. This claim was allowed at $2,647.71.

The next claim is that of the National Revere Bank of Boston, Mass. This was upon a note for $2,086.20 dated June 8, 1900, upon which interest had been paid up to October 8, 1900, which note was a renewal with payments of a note for $2,318 dated March 13, 1894. This claim was allowed at $2,357.05.

The next claim is that of the Wachusett National Bank of Fitchburg, Mass., and consists of four notes, as follows:

Note for $2,250 dated July 30, 1900, upon which interest was paid up to November 30, 1900, which note was a renewal with payments, of a note for $2,500 dated May 3, 1894.

Note for $9,012.50 dated July 14, 1900, upon which interest was paid up to November 14, 1900, which note was a renewal of a note for $10,000 dated February 25, 1895.

Note for $200 dated July 14, 1900 with interest.

Note for $45. dated July 30, 1900, with interest.

The claim of this Bank was allowed at $12,925.34.

153 The next claim is that of the First National Bank of Norwich, Conn. This was upon two notes, as follows:

Note for $1,650 dated August 6, 1900, upon which interest was paid up to December 6, 1900, which note was a renewal with payments, of a note for $1,836 dated March 2, 1894.

Note for $33.00 dated August 6, 1900 with interest.

The claim of this Bank was allowed at $1,885.93.

The next claim is that of the Lawrence National Bank of Lawrence, Mass. This was upon two notes, as follows:

Note for $2,064.60 dated August 20, 1900, upon which interest was paid up to December 20, 1900, which note was a renewal with payments, of a note for $2,294 dated March 12, 1894.

Note for $41.30 dated August 20, 1900, with interest.

The claim of this Bank was allowed at $2,355.21.

The next claim is that of Jersey Shore Banking Company of Jersey Shore, Pa. This was upon a note for $278.10 dated August 20, 1900, upon which interest was paid to December 20, 1900, which note was a renewal with payments of a note for $309 dated March 14, 1894. This claim was allowed at $311.00.

The next claim is that of the Merchants' National Bank of Norwich, Conn. This was upon two notes, as follows:

Note for $1,043.10 dated August 20, 1900, upon which interest was paid up to December 20, 1900, which note was a renewal with payments, of a note for $1,159 dated March 14, 1894.

Note for $20.86 dated August 20, 1900, with interest.

154 The claim of this Bank was allowed at $1,189.73.

The next claim is that of the National Bank of Marblehead, Mass. This was upon two notes, as follows:

Note for $1,043.10 dated August 20, 1900, upon which interest was paid up to December 20, 1900, which note was a renewal of a note for $1,159 dated March 14, 1894.

Note for $20.86 dated August 20, 1900 with interest.

The claim of this Bank was allowed at $1,189.73.

The next claim is that of the Blackstone National Bank of Boston, Mass. This was upon a note dated December 26, 1899, for $2,086.20 upon which interest was paid to August 27, 1900, which note was a renewal of a note for $3,318 dated March 20, 1894. This claim was allowed at $2,372.35.

The next claim is that of the First National Bank of Provincetown, Mass. This was upon two notes, as follows:

Note for $1,016.10 dated September 10, 1900, with interest, which was a renewal, with payments of a note for $1,129 dated March 13, 1894.

Note for $30.82 dated September 15, 1900, with interest.

The claim of this Bank was allowed at $1,153.27.

The next claim is that of the Bristol County National Bank of Taunton, Mass. This was upon a note for $467.10 dated September 21, 1900, with interest, and was a renewal, with payments, of a note for $519, dated March 14, 1894.

155 This claim was allowed at $545.75.

The next claim is that of the Winchester National Bank of Winchester, New Hampshire. This was upon two notes, as follows:

Note for $3,888.90 dated September 27, 1900, upon which interest was paid to March 27, 1901, which note was a renewal with payments, of a note for $4,321 dated March 1, 1894.

Note for $116.67 dated September 15, 1900, with interest.

The claim of this Bank was allowed at $4,416.33.

The next claim is that of the Mechanics National Bank of New Bedford, Mass. This was upon two notes, as follows:

Note for $2,092.50 dated October 10, 1900, upon which interest was paid up to April 10, 1901, which note was a renewal with payments, of a note for $2,325 dated March 12, 1894.

Note for $62.76 dated October 10, 1900, with interest.

This claim was allowed at $2,372.65.

The next claim is that of the Old Colony National Bank of Plymouth, Mass. This was upon two notes, as follows:

Note for $4,982.40 dated October 10, 1900, upon which interest was paid up to April 10, 1901, which note was a renewal with payments, of a note for $5,536 dated March 14, 1894.

Note for $149.46 dated October 10, 1900 with interest.

The claim of this Bank was allowed at $5,649.51.

The next claim is that of A. G. Folsom, New Hampshire. This was upon a note for $209.70 dated September 21, 1900, with payments, which note was a renewal with payments, of a
156 note for $233 dated March 13, 1894. Also a note for $6.30 dated September 15, 1900, with interest. This claim was allowed at $244.74.

The next claim is that of the Northborough National Bank of Northboro, Mass. This was upon two notes, as follows:

Note for $521.10 dated October 10, 1900, upon which interest was paid up to April 10, 1901, which note was a renewal wtih payments, of a note for $579 dated March 12, 1894.

Note for $15.63 dated October 10, 1900 with interest.

The claim of this Bank was allowed at $590.59.

The next claim is that of A. D. Putman. This was upon two notes, as follows:

Note for $348.60 dated October 10, 1900, upon which interest was paid to April 10, 1901, which note was a renewal with payments, of a note made to the First National Bank of Killingly, March 15, 1894, for $1,162; for this $1,162 note, there were also given two other notes, one held by Chas. P. Backus for $348.60 and the other held by C. S. Burlingame, for $348.60 which two notes are described below.

Note for $10.47 dated October 10, 1900 with interest.

The claim was allowed at $395.42.

The next claim is that of Chas. P. Backus. This was upon two notes as follows:

Note for $348.60 dated October 10, 1900, upon which interest was paid to April 10, 1901, which, together with the Putman note

for $348.60 and the Burlingame note for $348.60 was a re-
157 newal with payments, of a note made to the First National Bank of Killingly for $1,162 dated March 15, 1894.

Note for $10.47 dated October 10, 1900, with interest.

This claim was allowed at $395.42.

The next claim is that of C. S. Burlingame. This was upon two notes, as follows:

Note for $348.60 dated October 10, 1900, upon which interest was paid to April 10, 1901, which note together with the Putman note for $348.60 and the Backus note for $348.60 was a renewal with payments, of a note made to the First National Bank of Killingly for $1,162 dated March 15, 1894.

Note for $10.47 dated October 10, 1900, with interest.

This claim was allowed at $395.73.

The next claim is that of E. A. Norcross. This claim was upon a note for $10,000 dated July 1, 1893, upon which interest was paid up to January 1, 1901, which note is listed in the name of Amasa Norcross Estate, Fitchburg, Mass. This claim was allowed at $11,219.84.

The next claim is that of the Bank of Minnesota, Wm. H. Lightner, Receiver. This was upon a note for $1,050 dated December 7, 1896, upon which interest was paid to December 5, 1900 and was a renewal with payments, of a note for $3,500 dated December 22, 1895. This claim was allowed at $1,176.70.

The next claim is that of the Germania Bank of St. Paul, Minn.
This was upon a note for $825 dated April 1, 1899, upon
158 a note for $825 dated April 1, 1899, upon which interest was paid up to November 22, 1900, which note was a renewal with payments of a note for $4,350 dated March 29, 1893. This claim was allowed in favor of Gustav Willius, Receiver of said Bank at $926.48.

The next claim is that of the Belknap Savings Bank of Laconia, N. H.

This was upon two notes, as follows:

Note for $5,000 dated August 13, 1900, upon which interest was paid up to December 13, 1900, which was a renewal of a note dated December 20, 1893. Prior to this time it was known as the H. J. Crippen note.

Note for $100 dated August 13, 1900, with interest.

This claim was allowed in favor of W. A. Plummer, Assignee of said Bank in the sum of $5,708.93.

The next claim is that of the Gloucester National Bank of Gloucester, Mass. This was upon two notes, as follows:

Note for $270 dated October 10, 1900, which note was a renewal with payments of a note for $300 dated March 12, 1894.

Note for $8.10 dated October 10, 1900 with interest.

This claim was allowed at $314.25.

159 Defendants rest.

The COURT: You have no rebuttal evidence?
Mr. WILSON: No, sir; the proofs are closed on both sides.

Testimony closed.

Defendants' counsel renews the motion to dismiss the complaint upon the whole case, and moves for the direction of a verdict for the defendants, on all the grounds stated on the motions heretofore made to dismiss the complaint, and on the following additional grounds:

9. That no cause of action has been pleaded or proved.

10. That the cause or causes of action on many of the claims to pay which the said assessment was levied, accrued more than six years before the commencement of this action.

11. That no judgment against the said corporation was obtained on many of the claims to pay which the said assessment was levied.

12. That many of the alleged debts to pay which the said assessment was levied were not payable within two years from the time they were respectively contracted.

13. That no action was brought against the said corporation upon many of said debts within two years after they became due.

Mr. WILSON: I move your Honor to direct a verdict for the plaintiff for the sum of $3,600, and interest up to to-day, which is computed at $675, amounting together to the sum of
160 $4,275., subject to correction.

The Court denies each of the motions made on behalf of the defendants for a dismissal of the complaint, and for judgment for the defendants.

Exception by defendants.

Motion for direction of verdict for the defendants denied.

Exception by defendants.

The COURT: I will grant the motion for the direction of a verdict in favor of the plaintiff.

Exception by defendants.

In accordance with the direction of the Court, the jury render a verdict for the plaintiff for the sum of $3,600, principal, and $675., interest, amounting together to $4,275.

Defendants' counsel excepts to the direction of a verdict for the plaintiff.

Defendants' counsel moves for new trial.

Motion denied. Exception by defendants.

Stay of sixty days after entry of judgment in perfecting appeal and to make up writ of error granted defendants.

161 The foregoing contains all the evidence given and the proceedings had on the trial of this action.

And forasmuch as none of said matters and exceptions so offered and made to the rulings and directions of said Judge, and none of the evidence and other things do appear upon the record of said case, therefore, upon the prayer of the said defendants by their counsel, the said Judge has signed and settled this Bill of Exceptions, and he

doth order the same to be filed by the Clerk *nunc pro tunc*, as of the 9th day of March, 1906.

Dated, March 28th, 1906.

GEORGE C. HOLT,
District Judge.

It is consented that the foregoing be settled and signed as the bill of exceptions in this case.

Dated March 27th, 1906.

WILSON & WALLIS,
Attorneys for Plaintiff.
LIEBMANN, NAUMBERG & TANZER,
Attorneys for Defendants.

162 (Endorsed:) United States Circuit Court, Southern District of New York.—Theodore R. Converse, as Receiver of the Minnesota Thresher Manufacturing Company, Plaintiff, against Mayer S. Bernheimer and Lorin S. Bernheimer, as surviving executors of the last Will and Testament of Simon Bernheimer, deceased.—Bill of Exceptions.—U. S. Circuit Court, Southern District New York. Filed Mar. 29, 1906, John A. Shields, Clerk.

163 In the Supreme Court of the United States, October Term, 1905.

MAYER S. BERNHEIMER and LORIN S. BERNHEIMER, as surviving Executors of the Last Will and Testament of Simon Bernheimer, Deceased, Plaintiffs in Error,

against

THEODORE R. CONVERSE, as Receiver of the Minnesota Thresher Manufacturing Company, Defendant in Error.

And now come the said Mayer S. Bernheimer and Lorin S. Bernheimer, as surviving executors of the last will and testament of Simon Bernheimer, deceased, plaintiffs in error, by Liebmann, Naumburg & Tanzer their attorneys, and say, that in the record and proceedings and in rendering the judgment aforesaid, there is manifest error, in this, to wit:

(1.) The Court below erred in denying the motion of the plaintiffs in error made upon the opening of the trial for a dismissal of the complaint and for judgment for the plaintiffs in error, the defendants below, on the following grounds:

1. That the complaint does not state facts sufficient to constitute a cause of action in favor of the plaintiff against the defendants.

2. That Chapter 272 of the General Laws of Minnesota of 1899 under the alleged authority of which the assessment here sued upon is claimed to have been levied, contravenes the provisions of Section 10 of Article I of the Constitution of the United States, in that it impairs the obligation of the contracts of the stockholders of the Minnesota Thresher Manufacturing Company, and of the
164 creditors of the said corporation, and particularly of the defendants' testator and of these defendants as his executors.

3. That these defendants were not parties to the proceeding in which the said assessment was assumed to be levied, and are not bound thereby.

4. That the said Chapter 272 of the General Laws of Minnesota of 1899, and all proceedings had thereunder, so far as it is sought thereby to charge with liability or to effect these defendants, or to take their property in the amounts and for the purposes mentioned in the complaint, contravene the provisions of Section 1 of Article XIV of the Amendments to the Constitution of the United States, in that they deprive the stockholders of said corporation, who were not parties to the said proceedings, nor heard therein, nor served with process therein, and particularly these defendants, of property without due process of law, and deny to them the equal protection of the laws.

5. That the District Court of Washington County, Minnesota, had no jurisdiction to entertain the said proceedings or to appoint a receiver, or to levy an assessment therein, because the proceeding in said court was not a proceeding of the nature contemplated by, or instituted in the manner directed in, said Act of 1899, or Chapter 76 of the General Statutes of Minnesota.

6. That the plaintiff has no such title or interest as gives him a standing to maintain this action in a court of a jurisdiction other than that in which he was appointed.

7. That the said Minnesota Thresher Manufacturing Com-
165 pany was a corporation organized for the purpose of carrying on a manufacturing business, and its stockholders are exempt from liability under the provisions of Sections 3 of Article X of the Constitution of the State of Minnesota.

8. That this action was not brought within two years after these defendants or their testator ceased to be stockholders in said corporation, within the meaning of Section 55 of the Stock Corporaton Law of the State of New York.

(2.) The Court below erred in denying the motion of the plaintiffs in error, made at the close of the plaintiff's case for a dismissal of the complaint and for judgment for defendants upon all of said grounds and on the additional ground that no cause of action had been pleaded or proved.

(3.) The Court below erred in denying the motion of the plaintiffs in error made at the close of the evidence for a dismissal of the complaint on all of said grounds and on the following additional grounds:

9. That no cause of action had been pleaded or proved.

10. That the cause or causes of action on many of the claims to pay which the said assessment was levied, accrued more than six years before the commencement of this action.

11. That no judgment against the said corporation was obtained on many of the claims to pay which the said assessment was levied.

12. That many of the alleged debts to pay which the said assess-
ment was levied were not payable within two years from the
166 time they were respectively contracted.

13. That no action was brought against the said corpora-

tion upon many of said debts within two years after they became due.

(4.) The Court erred in refusing to direct a verdict in favor of the plaintiffs in error, the defendants below on all the grounds heretofore stated.

(5.) The Court erred in granting the motion of the defendant in error, the plaintiff below for a direction of a verdict in favor of said plaintiff and against said defendants, and in directing such verdict as aforesaid.

(6.) The Court erred in rendering a judgment in favor of the defendant in error and against the plaintiffs in error.

(7.) The Court erred in refusing to hold that the Laws of Minnesota for 1899, being Chapter 272 of said laws, are in contravention of the Constitution of the United States.

(8.) The Court below erred in holding that the plaintiff might recover interest, and in including interest in said judgment rendered herein, and in giving judgment in favor of the plaintiff and against the defendants for too great an amount.

(9.) The complaint does not support the judgment.

(10.) The said judgment was given in favor of the said Theodore R. Converse, as Receiver of the Minnesota Thresher Manufacturing Company, defendant in error, the plaintiff below and against
167 the said Mayer S. Bernheimer and Lorin S. Bernheimer, as surviving executors of the last will and testament of Simon Bernheimer, deceased, the plaintiffs in error, the defendants below whereas by the law of the land it ought to have been given in favor of said defendants and against the said plaintiff.

Wherefore the said plaintiffs in error pray that said judgment may be reversed, annulled and altogether held for naught, and that they may be restored to all things which they have lost by reason of the said judgment.

Dated April 9th, 1906.

LIEBMANN, NAUMBURG & TANZER,
Attorneys for Plaintiffs in Error.

(Endorsed:) Supreme Court of the U. S., October Term, 1905.—Mayer S. Bernheimer, *et al.*, etc., Plaintiffs in Error, against Theodore R. Converse, etc., Defendant in error.—Assignment of Errors.—Liebmann, Naumburg & Tanzer, Attorneys for Plaintiffs in error, 32 Broadway, New York.—U. S. Circuit Court, Southern District New York, Filed Apr. 9, 1906, John A. Shields, Clerk.

168 Circuit Court of the United States, Southern District of New York.

THEODORE R. CONVERSE, as Receiver of The Minnesota Thresher Manufacturing Company, Plaintiff,

against

MAYER S. BERNHEIMER and LORIN S. BERNHEIMER, as Surviving Executors of the Last Will and Testament of Simon Bernheimer, Deceased, Defendants.

Know all men by these presents, That we, Mayer S. Bernheimer and Lorin S. Bernheimer, as surviving executors of the last will and testament of Simon Bernheimer, deceased, as principals, and Federal Union Surety Company, as surety, are held and firmly bound unto the above named plaintiff, Theodore R. Converse as receiver of the Minnesota Thresher Manufacturing Company, in the sum of Five thousand five hundred ($5,500.) Dollars, to be paid to the said Theodore R. Converse as Receiver as aforesaid, his executors, administrators and assigns, for the payment of which well and truly to be made, we bind ourselves and each of us, our and each of our executors, administrators and successors, jointly and severally, firmly by these presents.

Sealed with our seals, and dated the 30th day of March, 1906.

Whereas the above-named Mayer S. Bernheimer and Lorin S. Bernheimer, as surviving executors of the last will and testament of Simon Bernheimer, deceased, have prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the above-entitled action in the Circuit Court of the United States for the Southern District of New York, on the 14th day of March, 1906.

169 Now, therefore, the condition of this obligation is such that if the above named Mayer S. Bernheimer and Lorin S. Bernheimer, as surviving executors of the last will and testament of Simon Bernheimer, deceased, shall prosecute the said writ of error to effect and answer all damages and costs if they shall fail to make said plea good, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

MAYER S. BERNHEIMER. [SEAL.]
LORIN S. BERNHEIMER. [SEAL.]

Sealed and delivered this — day of March, 1906.

FEDERAL UNION SURETY COMPANY,
By ROBERT M. NUGENT,
[L. S.] *Res. Vice-President.*

Attest:
F. STEARNS EDICK,
Res. Ass't Secretary.

STATE OF NEW YORK, *County of New York, ss:*

On the 31st day of March 1906, before me personally came Mayer S. Bernheimer and Lorin S. Bernheimer to me known and known to me to be the individual- described in and who executed the foregoing instrument and duly acknowledged to me that they executed the same.

SIGMUND WECHSLER,
Not. Pub., #41, N. Y. Co.

Form 400. 12-17-'03.

170 *Form of Affidavit, Acknowledgment, and Justification by Guarantee or Surety Company.*

STATE OF NEW YORK, *County of New York, ss:*

On this 30th day of March, one thousand nine hundred and six, before me personally came Robert M. Nugent, known to me to be the Resident Vice-President of the Federal Union Surety Company, the corporation described in and which executed the annexed bond of Mayer S. Bernheimer, and others as surety thereon, and who, being by me duly sworn, deposes and says that he resides in the City of New York, State of New York; that he is the Resident Vice-President of said Company, and knows the corporate seal thereof; that said Federal Union Surety Company is duly and legally incorporated under the laws of the State of Indiana; that said Company has complied with the provisions of the act of Congress of August 13, 1894, allowing certain corporations to be accepted as surety on bonds; that the seal affixed to the annexed bond (Form —) of Mayer S. Bernheimer, and others is the corporate seal of said Company, and was thereto affixed by order and authority of the board of directors of said Company; and that he signed his name thereto by like order and authority as Resident Vice-President of said Company; and that he is acquainted with F. Sterns Edick and knows him to be the Resident Assistant Secretary of said Company; and that the signature of said F. Sterns Edick subscribed to said bond is in the genuine handwriting of said F. Stearns Edick and was thereto subscribed by order and authority of said board of directors, and in the presence of said deponent; and that the assets of said Company, unincumbered and liable to execution, exceed its claims, debts and liabilities of every nature whatsoever, by more than the sum of Two hundred and fifty thousand dollars, Robert M. Nugent of New York City, N. Y., is attorney for service of process for the District in which this bond is given.

ROBERT M. NUGENT,
(Deponent's Signature.)

Sworn to, acknowledged before me, and subscribed in my presence this 30th day of March, 1906.

[L. S.]

CATHRYN F. ASPELL,
Notary Public, New York County.

Cert. filed in Kings, Queens, Suffolk, Richmond & Westchester Counties.

171 (Endorsed:) Circuit Court of the United States, Southern District of New York.—Theodore R. Converse, as Receiver, of the Minnesota Thresher Manufacturing Company, Plaintiff, against Mayer S. Bernheimer and Lorin S. Bernheimer, as surviving executors of the last will and testament of Simon Bernheimer, deceased, Defendants.—Bond for damages and costs.—Surety: Federal Union Surety Company.—Approved as to form and also as to sufficiency of sureties, with reservation, however, to the Plaintiff, of the right at any time to examine the proper officers of the Surety Company, under oath, touching its assets, liabilities and financial condition generally. E. H. Lacombe, U. S. Circuit Judge.—U. S. Circuit Court, Southern District New York, Filed Apr. 11, 1906, John A. Shields Clerk.

172 UNITED STATES OF AMERICA, *ss:*

To Theodore R. Converse, as Receiver of the Minnesota Thresher Manufacturing Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, D. C., within thirty days from the date hereof, pursuant to a petition for writ of error filed in the Clerk's office of the Circuit Court of the United States for the Southern District of New York, wherein Mayer S. Bernheimer and Lorin S. Bernheimer, as surviving executors of the last will and testament of Simon Bernheimer, deceased, were petitioners, and you, the said Theodore R. Converse, as Receiver of the Minnesota Thresher Manufacturing Company, were defendant in error, and you are required to show cause, if any there be, why the judgment rendered against the said petitioners as in the said petition mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable E. Henry Lacombe, U. S. Circuit Judge, this 9 day of April in the year of our Lord, one thousand nine hundred and six.

E. H. LACOMBE,
U. S. Circuit Judge.

173 [Endorsed:] E. & AC. 2458 Supreme Court of the U. S. October Term 1905 Mayer S. Bernheimer, *et al.*, etc., Plaintiffs in error, against Theodore R. Converse, etc., Defendant in error. Citation. Liebmann, Naumburg & Tauzer, Attorneys for plaintiff in error, 32 Broadway New York. We hereby, this 10th day of April 1906 accept due personal service of this citation on behalf of Theodore R. Converse, defendant in error. Wilson & Wallis, Attorneys for defendant in error. U. S. Circuit Court. Filed Apr. 11 1906 Southern District New York. John A. Shields, Clerk.

174 [Endorsed:] Supreme Court of the United States Bernheimer *et al.*, Pl'ffs in Error *vs.* Converse etc. Def't in Error.

175 In the Supreme Court of the United States.

MAYER S. BERNHEIMER, and LORIN S. BERNHEIMER, as Surviving Executors of the Last Will and Testament of Simon Bernheimer, Deceased, Plaintiffs in Error,

versus

THEODORE R. CONVERSE, as Receiver of Minnesota Thresher Manufacturing Company, Defendant in Error.

MAX DREY, CHARLES D. BERNHEIMER, and MEYER A. BERNHEIMER, as Executors of the Last Will and Testament of Isaac Bernheimer, Deceased, Plaintiffs in Error,

versus

THEODORE R. CONVERSE, as Receiver of Minnesota Thresher Manufacturing Company, Defendant in Error.

Whereas, the plaintiffs in error in the first above entitled cause have prosecuted a writ of error to the Supreme Court to reverse a certain judgment rendered in the Circuit Court of the United States for the Southern District of New York, on March 14, 1906, upon a verdict found by direction of the court in favor of the defendant in error, upon the trial of an action pending therein, wherein said defendant in error was plaintiff; and

Whereas, the plaintiffs in error in the second above entitled cause have prosecuted a writ of error to the Supreme Court to reverse a certain other judgment rendered in the Circuit Court of the United States for the Southern District of New York on said March 14, 1906, upon a verdict found by direction of the court in favor of the same defendant in error upon the trial of another action pending therein wherein said defendant in error was plaintiff; and

176 Whereas said two actions were tried on the same day and before the same judge, and the records and bills of exceptions in the two causes are substantially the same, and differ only in the names of the plaintiffs in error and in the dates of death and administration of the respective testators and in certain other matters of detail, and the said judgments are identical in amount and exactly the same issues are involved in each cause,

Now therefore, it is stipulated and agreed by and between the parties to said causes by their respective attorneys and counsel that the said causes be heard together upon a single printed record entitled in both causes and that in printing such record it shall be sufficient to print the record of the first above entitled cause in full, and to print a sufficient note or statement in addition to indicate the particulars wherein the record of the second above entitled cause differs from the record so printed in full.

The said particulars are hereby agreed to be as follows:

1st. Wherever the names of Mayer S. Bernheimer and Lorin S. Bernheimer, as surviving executors of the last will and testament of Simon Bernheimer, deceased, occur in the said record, the names of these plaintiffs in error, to wit, Max Drey, Charles D. Bernheimer

and Meyer A. Bernheimer, as executors of the last will and
177 testament of Isaac Bernheimer, deceased, are substituted therefor.

2nd. Wherever the name "Simon Bernheimer" occurs in the said record, the name Isaac Bernheimer, the testator of these plaintiffs in error, is substituted therefor.

3rd. The affidavit of service of the summons and complaint in said cause shows service of said summons and complaint on all the defendants in this cause on January 29th, 1904.

4th. Instead of paragraph XI of the amended answer in said record is substituted the following: "XI. That the said Isaac Bernheimer died on or about the 23rd day of July, 1893, leaving property in the State of Minnesota, and leaving a Last Will and Testament which was duly admitted to probate in the Probate Court of the County of Ramsey and State of Minnesota having jurisdiction of the same, on or about the 5th day of June, 1895, and letters testamentary were thereupon duly issued to the executors named therein who qualified. That thereafter and on the 5th day of June, 1895, an order was duly made by the said Court allowing six months from and after the date of the said order, in which all persons having claims or demands against the said Isaac Bernheimer were required to file the same in the said Probate Court for examination and allowance or be forever barred; and appointing the first Monday in January, 1896, at ten o'clock A. M. at a General Term of said Probate Court, to be held at the Court House in the City of St. Paul in said County as the time and place when and where the said Probate Court would examine and adjust said claims and demands, and directing that notice of such hearing be given to all creditors and persons interested in said estate by forthwith publishing the said order once in each week for three successive weeks in the Daily Pioneer Press, a daily newspaper printed and published in said County. That the said order was published at the times and in the manner in said order directed;" and the said amended answer is verified by Meyer A. Bernheimer, one of the said defendants.

5th. In defendants' Exhibit 1, which is the agreed statement of facts, instead of paragraph "twenty-fourth" thereof is substituted the following:

"Twenty-fourth. This action was commenced on January 29, 1904."

6th. Instead of paragraph designated as "I" in the said Defendant's Exhibit 1, is substituted the following:

"I. Isaac Bernheimer did in the City of New York, on July 23, 1893, leaving property in the State of Minnesota, and leaving a Last Will, which was admitted to probate in the office of the Surrogate of the County of New York, September 5, 1893, and Letters Testamentary were thereupon issued to these defendants, who duly qualified thereunder, and still remain such Executors.

The said Will of Isaac Bernheimer was duly proved and
178 recorded in the Probate Court of the County of Ramsey in the State of Minnesota, and Letters Testamentary were duly

issued by such Court to the defendants Meyer A. Bernheimer and Max Drey, who duly qualified thereunder, and still remain such executors.

On June 5th, 1895, the said Probate Court of the County of Ramsey, having jurisdiction of said Will, duly made an order which is as follows:

In Probate Court.

STATE OF MINNESOTA, *County of Ramsey*, ss:

In the Matter of the Estate of ISAAC BERNHEIMER, Deceased.

Letters testamentary on the Estate of Isaac Bernheimer, deceased, late of the County of New York, and State of New York, being granted to Meyer A. Bernheimer and Max Drey,

It is ordered, that six months be and the same is hereby allowed from and after the date of this Order, in which all persons having claims or demands against the said deceased, are required to file the same in the Probate Court of said County, for examination and allowance, or be forever barred.

It is further ordered, that the first Monday in January, 1896, at 10 o'clock A. M. at a General Term of said Probate Court, to be held at the Court House, in the City of Saint Paul, in said County, be, and the same hereby is appointed as the time and place when and where the said Probate Court will examine and adjust said claims and demands.

And it is further ordered, that notice of such hearing be given to all creditors and persons interested in said estate by forthwith publishing this Order once in each week for three successive weeks in the Daily Pioneer Press, a daily newspaper printed and published in said County.

Dated At St. Paul, this 5th day of June 1895.

By the Court:

[L. S.] G. WILLRICH,
Judge of Probate.

Notice was duly published as required by the said order.

On November 16th, 1896, the following decree was duly made by the said Probate Court of the County of Ramsey:—

In Probate Court, Special Term, November 16, 1896.

"STATE OF MINNESOTA, *County of Ramsey*, ss:

In the Matter of the Estate of ISAAC BERNHEIMER, Deceased.

It appearing to the court now here on satisfactory proofs and the evidence that the funeral charges, expenses of last sickness of said deceased, and the cost of administration of said estate have been fully paid and that no debts existing against said deceased or have been allowed by the Court and that all legacies provided for
179 by the last will and testament of said deceased have also been fully paid and satisfied, and that said estate has been fully administered as by the final account of Meyer A. Bernheimer and Max Drey, executors of said estate this day duly audited and allowed by this Court pursuant to due notice given and served will appear, reference being had thereto;

And it further appearing that due notice of the application for this final decree in said matter assigning the estate to the persons thereto entitled by law has likewise been duly given and served pursuant to the law in such case made and provided and decided;

And it further appearing that said deceased died testate and that the residue of said estate consists of the following described real estate, situate, lying and being in the State of Minnesota, in the following counties, to wit:

(Here follows description of real estate owned by said Isaac Bernheimer in the State of Minnesota.)

And it further appearing by the terms and provisions of the last will and testament of said Isaac Bernheimer, deceased, that Mayer A. Bernheimer, Charles D. Bernheimer and Max Drey therein mentioned are the persons entitled to the residue of the estate of said deceased upon the condition and trust in said will expressed.

Now therefore, on the petition of said Mayer A. Bernheimer and Max Drey, and pursuant to due notice and the law in such case provided:

It is ordered, adjudged and decreed, and this Court by virtue of the power and authority vested in the same by law, doth hereby Order, Adjudge and Decree that all and singular the above described real estate and all other the estate of said deceased in the State of Minnesota be, and the same is hereby assigned to and vested in the said Meyer A. Bernheimer, Charles D. Bernheimer and Max Drey upon the conditions and subject to the trust expressed in said last will and testament of said Isaac Bernheimer, deceased, bearing date the 14th day of December, A. D. 1892, and heretofore duly admitted to Probate in this Court without prejudice however to any lawful conveyances of said real estate or any part thereof by said persons or any of them.

To have and to hold the same together with all the hereditaments

and appurtenances thereunto belonging or in anywise appertaining to the above named persons, their successors and assigns forever,

By the Court,

G. WILLRICH,
Judge of Probate, Ramsey County, Minn.

Dated, November 18, A. D. 1896.

[Probate Court Seal.]"

180 Dated, New York, April 26, 1906.

MAYER S. BERNHEIMER AND
LORIN S. BERNHEIMER,
As Surviving Executors of the Last Will and Testament of Simon Bernheimer, Deceased, Plaintiff in Error and

MAX DREY,
CHARLES D. BERNHEIMER, AND
MEYER A. BERNHEIMER,
As Executors of the Last Will and Testament of Isaac Bernheimer, Deceased, Plaintiffs in Error,
By LIEBMANN, NAUMBURG & TANZER,
Attorneys,
LAURENCE ARNOLD TANZER, *Counsel.*
THEODORE R. CONVERSE,
As Receiver of the Minnesota Thresher Manufacturing Company, Defendant in Error,
By WILSON & WALLIS, *Attorneys,*
WILLIAM G. WILSON, *Counsel.*

181 [Endorsed:] Supreme Court of U. S. Mayer S. Bernheimer, *et al. vs.* Theodore R. Converse, as Receiver, *et al.* Max Drey, *et al., vs.* Theodore R. Converse, as Receiver, etc. Original. Stipulation as to Record.

182 [Endorsed:] File Nos. 20,233, 20,234. Supreme Court U. S. October Term, 1905. Term Nos. 731 and 732. Mayer S. Bernheimer *et al.*, Surviving Executors &c. P. E. *vs.* Theodore R. Converse, Receiver &c. Max Drey *et al.*, Executors &c., P. E. *vs.* Theodore R. Converse, Receiver &c. Stipulation as to printing record &c. Filed April 30th, 1906.

Endorsed on cover: File No. 20,233. S. New York. C. C. U. S. Term No. 278. Mayer S. Bernheimer and Lorin S. Bernheimer, surviving executors of the last will and testament of Simon Bernheimer, deceased, plaintiffs in error, *vs.* Theodore R. Converse, receiver of The Minnesota Thresher Manufacturing Company. Filed April 30th, 1906. File No. 20,233.

Nos. 276 and 278.

In the Supreme Court of the United States,

OCTOBER TERM, 1906.

MAYER S. BERNHEIMER and LORIN S. BERNHEIMER, Surviving Executors of the Last Will and Testament of Simon Bernheimer, deceased,

Plaintiffs-in-Error,

vs.

THEODORE R. CONVERSE, Receiver of the Minnesota Thresher Manufacturing Company,

Defendant-in-Error.

FILED.
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JAMES H. MCKENNEY
Clerk

MAX DREY, CHARLES D. BERNHEIMER, and MEYER A. BERNHEIMER, Executors of the Last Will and Testament of Isaac Bernheimer, deceased,

Plaintiffs-in-Error,

vs.

THEODORE R. CONVERSE, Receiver of the Minnesota Thresher Manufacturing Company,

Defendant-in-Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Brief for Plaintiffs-in-Error.

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Plaintiffs in Error,

vs.

THEODORE R. CONVERSE, Receiver of the Minnesota Thresher Manufacturing Company,

Defendant in Error.

No. 278.

MAX DREY, CHARLES D. BERNHEIMER, and MEYER A. BERNHEIMER, Executors of the Last Will and Testament of Isaac Bernheimer, deceased,

Plaintiffs in Error,

vs.

THEODORE R. CONVERSE, Receiver of the Minnesota Thresher Manufacturing Company,

Defendant in Error.

No. 279.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR PLAINTIFFS IN ERROR.

Statement of the Case.

These cases come up on writs of error to review judgments rendered in favor of the defendant in error, who was plaintiff

in the court below (and will be referred to as plaintiff) upon a verdict directed by the court against the plaintiffs in error, who were defendants below (and will be referred to as defendants).

The actions were brought by the plaintiff, as receiver of the Minnesota Thresher Manufacturing Company, a Minnesota corporation, against the defendants, as executors of two deceased stockholders, to recover the amount of an assessment imposed by the District Court of Washington County, Minnesota, on the so-called stockholders' double liability.

The cases were tried on agreed facts. The only questions involved are questions of law, as to the constitutionality of the statute under which the assessment was levied, as to the jurisdiction of the Minnesota Court to make the assessment, and as to its enforceability by the plaintiff against the defendants in the court in which the actions were brought.

The Minnesota Thresher Manufacturing Company was organized in 1884, to take over the assets and conduct the business of the Northwestern Manufacturing and Car Company, which in turn was the successor of Seymour, Sabin & Co.

Seymour, Sabin & Co. was a corporation organized under the laws of the State of Minnesota in 1874, for the purpose of carrying on the business of general manufacturing, merchandising, and lumber. It had an extensive manufacturing establishment and plant at Stillwater, Washington County, Minnesota, where it manufactured threshing machines and other farm and agricultural machinery and implements. These it sold largely upon credit, taking in many cases in payment mortgages, farmers' notes, or other liens on the property sold (Record, p. 28).

This company in 1882 sold all its real estate, buildings, manufacturing property and plant, together with its bills and accounts receivable, to the Northwestern Manufacturing and Car Company, a corporation organized for the "manufacture, building, and sale of steam engines of all kinds, and the manufacture, building, and sale of passenger cars, freight cars, flat cars, cattle cars, and all other kinds of cars, and the fixtures and attachments thereto belonging, and the manufacture and sale of farm implements and machinery of all kinds, and the manufacture and sale of all articles, implements,

and machinery of which wood and iron form the principal component parts, and the manufacture of the materials therein used" (p. 29).

The Northwestern Manufacturing and Car Company, with the assets so acquired, continued the manufacturing business of Seymour, Sabin & Co., until it became financially embarrassed, and on May 10, 1884, a receiver of its property was appointed by the District Court of Washington County, Minnesota, who continued the business under the direction of the Court (p. 29).

A meeting of the creditors of the company was held November 25, 1884, at which a committee of creditors was appointed to prepare a plan of reorganization (p. 29).

The liabilities of the company amounted to $3,406,359.49, and the assets were valued at $4,372,778.75, made up as follows:

Cars and machines constructed and in process of construction and materials for same....	$1,535,887.70
Real estate and buildings.....	413,526.50
Machinery, tools and fixtures.....	127,489.60
Bills receivable, and accrued interest.....	1,524,007.48
Patents, patterns, teams, etc.....	99,483.06
Accounts receivable	672,384.41
	$4,372,778.75

(Pp. 38, 39.)

The creditors' committee reported that this valuation of the assets "was an eminently conservative valuation, if the business of the company should be continued, but if the company's affairs are to be closed up and the assets sold out for cash, the valuation made by the receiver would be much too high;" and that this condition existed not only as to the manufacturing plant, and the property used in connection therewith, which would obviously depreciate greatly upon a liquidation of the company's affairs, but extended also to the item of farmers' notes, with a face value of $1,780,000; that if the business were continued, and the company continued to furnish repair parts, ninety-five per cent. of this amount could be

collected; but if the company went out of business, it would be hard to collect notes given for machines which would be useless to the purchasers as soon as a cog-wheel or other part of the machine should wear out (pp. 29-31).

The committee therefore recommended a plan of reorganization whereby a new corporation should be organized to issue its preferred stock to the creditors of the old company for their claims at par; to issue its common stock in exchange, share for share, for the preferred stock of the old company; to purchase, at judicial sale in the receivership action, all the assets and good will of the old company as an entirety and as a going concern; and thereafter to continue the manufacturing business of the old company (pp. 31, 32). The committee, in its report, gave the creditors the assurance: "No individual liability attached to a subscription, and the stock when issued will be full paid and non-assessable" (p. 34).

Pursuant to these recommendations, the Minnesota Thresher Manufacturing Company was incorporated by the filing of its articles of association with the Secretary of State of Minnesota December 5, 1884 (p. 38). The articles of association state the intention of the incorporators to form a corporation under the statute of Minnesota, entitled, "An act relating to manufacturing corporations," approved March 7, 1873, and the objects for which the corporation was formed are stated as being "the purchase of the capital stock, evidences of indebtedness issued by it, and the assets of the Northwestern Manufacturing and Car Company, a corporation existing under the laws of the State of Minnesota, or any portion of said capital stock, evidences of indebtedness or assets, and the manufacture and sale of steam engines of all kinds, farm implements and machinery of all kinds, and the manufacture and sale of all articles, implements and machinery of which wood and iron or either of them form the principal component parts, and the manufacture of the materials therein used" (p. 35).

The new company proceeded to carry out the plan of reorganization by issuing its stock in exchange for claims against, and the preferred stock of the old company. Among the holders of preferred stock in the old company who exchanged their stock for common stock in the new company,

were Simon Bernheimer and Isaac Bernheimer, the defendants' testators, each of whom, by such exchange, became the owners of two hundred shares of the common stock of the new company, of the par value of fifty dollars each. These shares were issued March 28, 1885, and contained the statement that they were "full paid and non-assessable" (pp. 40, 72).

The new company consummated the plan of reorganization by purchasing, at the receiver's sale on October 27, 1887, the manufacturing property and plant of the old company, together with its bills receivable and other assets. On January 5, 1888, it received a conveyance of the property. In February, 1888, it took possession of the assets, and continued the manufacturing business formerly carried on by the old company. This business it carried on for upwards of twelve years, until December 14, 1900, when E. D. Buffington was appointed receiver (p. 40).

At the time of acquiring the property of the Northwestern Manufacturing and Car Company, on January 5, 1888, the Minnesota Thresher Manufacturing Company executed a trust mortgage to secure bonds issued by it. This mortgage covered all the real estate, property, assets and franchises of the company. The company becoming financially embarrassed, the trustee under the mortgage filed a bill to foreclose it in the United States Circuit Court for the District of Minnesota. That court on December 14, 1900, appointed E. D. Buffington receiver of all the property covered by the mortgage. The receiver qualified as such, took possession of the assets and property of the corporation, and carried on the business under the direction of the court, until the foreclosure sale. On May 25, 1901, all the property covered by the mortgage was sold under final decree of foreclosure and sale, and a conveyance of the entire property was on June 13, 1901, executed and delivered to the purchaser. The sale was confirmed on July 12, 1901, by decree of the court, and on September 4, 1901, the receiver was discharged, and he and his sureties released from obligation on his bond (pp. 72, 73).

The assessment here in suit was made in proceedings instituted after the foreclosure sale. Before inquiring into those proceedings, it may be well to examine the statute which

is claimed to authorize them, and the change in the law made by that statute, to which the defendants object as impairing rights guaranteed them by the Constitution of the United States.

The provisions of law relating to the double liability of stockholders at the time when the defendants acquired their stock were Section 3 of Article 10 of the Constitution of the State of Minnesota, which provides as follows:

> "Each stockholder in any corporation (excepting those organized for the purpose of carrying on any kind of manufacturing or mechanical business) shall be liable to the amount of stock held or owned by him;"

and Chapter 76 of the General Statutes of Minnesota of the year 1878, as re-enacted in the General Statutes of 1894. The provisions of that Statute are as follows:

> "SECT. 5897. Whenever a judgment is obtained against any corporation incorporated under the laws of this State, and an execution issued thereon is returned unsatisfied in whole or in part, upon the complaint of the person obtaining such judgment, or his representatives, the District Court within the proper county may sequestrate the stock, property, things in action and effects of such corporation, and appoint a receiver of the same.
>
> SECT. 5905. Whenever any creditor of a corporation seeks to charge the directors, trustees or other superintending officers of such corporation, or the stockholders thereof, on account of any liability created by law, he may file his complaint for that purpose in any district court which possesses jurisdiction to enforce such liability.
>
> SECT. 5906. The Court shall proceed thereon, as in other cases, and when necessary shall cause an account to be taken of the property and debts due to and from such corporation, and shall appoint one or more receivers.
>
> SECT. 5907. If, on the coming in of the answer or upon the taking of any such account, it appears that such corporation is insolvent, and that it has no property or effects to satisfy such creditors, the Court may proceed, without appointing any receiver, to ascertain the respective liabilities of such directors and stock-

holders, and enforce the same by its judgment, as in other cases.

SECT. 5908. Upon a final judgment in any such action to restrain a corporation or against directors or stockholders, the Court shall cause a just and fair distribution of the property of such corporation, and of the proceeds thereof to be made among its creditors.

SECT. 5909. In all cases in which the directors or other officers of a corporation, or the stockholders thereof, are made parties to an action in which a judgment is rendered, if the property of such corporation is insufficient to discharge its debts, the Court shall proceed to compel each stockholder to pay in the amount due and remaining unpaid on the shares of stock held by him, or so much thereof as is necessary to satisfy the debts of the company.

SECT. 5910. If the debts of the company remain unsatisfied, the Court shall proceed to ascertain the respective liabilities of the directors or other officers and of the stockholders, and to adjudge the amount payable by each, and enforce the judgment, as in other cases.

SECT. 5911. Whenever any action is brought against any corporation, its directors or other superintending officers or stockholders, according to the provisions of this chapter, the Court, whenever it appears necessary or proper, may order notice to be published in such a manner as it shall direct, requiring all the creditors of such corporation to exhibit their claims and become parties to the action, within a reasonable time, not less than six months from the first publication of such order, and, in default thereof, to be precluded from all benefit of the judgment which shall be rendered in such action, and from any distribution which shall be made under such judgment."

These were, at the time when the defendants acquired their stock, the only provisions of law providing for or regulating the double liability of stockholders in Minnesota corporations, or relating to the enforcement of such liability (p. 41).

In April, 1899, many years after the defendants acquired their stock, the legislature of Minnesota enacted Chapter 272 of the General Laws of Minnesota for the year 1899, which is the act whose constitutionality is here called in question. That act is entitled "An act to provide for the better enforce-

ment of the liability of stockholders of corporations," and provides as follows:

SECTION 1. Whenever any corporation created or existing by or under the laws of the State of Minnesota, whose stockholders or any of them are liable to it or to its creditors, or for the benefit of its creditors, upon or on account of any liability for or upon or growing out of, or in respect to the stock or shares at any time held or owned by such stockholders, respectively, whether under or by virtue of the Constitution and laws of said State of Minnesota, or any statute of said State, or otherwise, has heretofore made or shall hereafter make any assignment for the benefit of its creditors under the insolvency laws of this State; or whenever a receiver for any such corporation has heretofore been or shall hereafter be appointed by any district court of this State, whether under or pursuant to any of the provisions of chapter seventy-six (76) of the General Statutes of eighteen hundred and ninety-four (1894) of Minnesota and the acts amendatory thereof, or under or pursuant to any other statute of this State or under the general equity powers and practice of such court; the district court appointing such receiver or having jurisdiction of the matter of said assignment may proceed as in this act provided.

SECTION 2. Upon the petition of the assignee or receiver of any such corporation, or of any creditor of such corporation who has filed his claim in such assignment or receivership proceedings, the said district court shall by order appoint a time for hearing not less than thirty (30) nor more than sixty (60) days from the time of filing said petition with the Clerk of said Court, and shall direct such notice of such hearing to be given by the party presenting said petition, by publication or otherwise, as the Court in its discretion may deem proper; but if said petition be filed by a creditor, other than the assignee or receiver of said corporation, the Court shall direct that notice of such hearing be personally served on such assignee or receiver.

SECTION 3. At such hearing the Court shall consider such proofs by affidavit or otherwise, as may then be offered by the assignee or receiver, or by any creditor or officer or stockholder of said corporation, who may appear in person or by attorney, as to the probable indebtedness of said corporation, and the expenses of said assignment or receivership, and the probable

amount of assets available for the payment of such indebtedness and expenses; and also as to what parties are or may be liable as stockholders of said corporation and the nature and extent of such liability. And if it appear to the satisfaction of the Court that the ordinary assets of said corporation, or such amount as may be realized therefrom within a reasonable time, will probably be insufficient to pay and discharge in full and without delay its indebtedness and the expenses of such assignment or receivership, and that it is necessary or proper that resort be had to such liability of its stockholders; the said Court shall thereupon by order direct and levy a ratable assessment upon all parties liable as stockholders, or upon or on account of any stock or shares of said corporation, for such amount, proportion or percentage of the liability upon or on account of each share of said stock as the Court in its discretion may deem proper (taking into account the probable solvency or insolvency of stockholders and the probable expenses of collecting the assessment); and shall direct the payment of the amount so assessed against each share of said stock to the assignee or receiver within such time thereafter as said Court may specify in said order.

SECTION 4. Said order shall direct the assignee or receiver to proceed to collect the amount so assessed against each share of said stock from the parties liable therefor; and shall direct and authorize said assignee or receiver, in case of the failure of any party liable upon or on account of any share or shares of said stock to so pay the amount so assessed against the same within the time specified in said order, to prosecute actions against each and every such party so failing to pay the same, wherever such party may be found, whether in this State or elsewhere.

SECTION 5. Said order and the assessment thereby levied shall be conclusive upon and against all parties liable upon or on account of any stock or shares of said corporation, whether appearing or represented at said hearing, or having notice thereof or not, as to all matters relating to the amount of and the propriety of and necessity for the said assessment. This provision shall also apply to any subsequent assessment levied by said Court, as hereinafter provided.

SECTION 6. It shall be the duty of such assignee or receiver to, and he may, immediately after the expiration of the time specified in said order for the payment

of the amount so assessed by the parties liable therefor, institute and maintain an action or actions against any and every party liable upon or on account of any share or shares of said stock who has failed to pay the amount so assessed against the same, for the amount for which such party is so liable. Said actions may be maintained against each stockholder, severally, in this State, or in any other State or country where such stockholder, or any property subject to attachment, garnishment or other process in an action against such stockholder may be found. But if said assignee or receiver shall in good faith believe any stockholder so liable to be insolvent, or that the expense of prosecuting such action against such stockholder will be so great that it will be of disadvantage to the estate and the interest of creditors to prosecute the same, said assignee or receiver shall so report to said Court; and shall not be required to institute or prosecute any such action unless specifically directed so to do by said Court. And in such case said Court shall not require said Receiver to institute or maintain such action unless said Court shall have reasonable cause to believe that the result of such action will be of advantage to the estate and creditors of said corporation, except as hereinafter provided.

SECTION 7. In any case where the Court shall have levied an assessment against stockholders as in this act provided, for a less amount or proportion than the full amount of the liability upon or on account of the stock of said corporation, and it shall thereafter be made to appear to the satisfaction of said Court by petition or otherwise, and upon hearing as hereinbefore provided, that by reason of the insolvency of stockholders, or for any other cause, it is necessary or desirable or for the interest of creditors that another and further assessment upon or against said stock be levied, the Court shall by order direct and levy a further and additional assessment for such amount, proportion or percentage of the liability upon or on account of each share of said stock, as said Court in its discretion may deem proper, and in the same manner may levy further and additional assessment upon said stockholders, and against said stock, not exceeding in the aggregate, the maximum of liability upon or on account of the stock of said corporation.

SECTION 8. All the provisions of this act shall apply to any such assessment levied by said Court after the

first, and to the proceedings preliminary to levying and directing the same, to the same extent and with the same force and effect as to the first assessment so levied under the provisions of this act.

SECTION 9. Where two (2) or more such assessments are levied or directed, the assignee or receiver may join the causes of action accruing against any stockholder upon any two or more such assessments in a single action against such stockholder or he may, at his discretion, unless otherwise directed by the Court, maintain a separate action against each stockholder for each successive assessment levied or directed.

SECTION 10. If said assignee or receiver shall fail to institute and prosecute an action against any stockholder who has failed to pay any such assessment or assessments, or to prosecute such an action with diligence after instituting the same, any stockholder or stockholders who have paid in full the amount of any such assessments, or any creditor or creditors of said corporation, may petition said Court to require said assignee or receiver to prosecute such action against such stockholders so failing to pay as aforesaid, or to permit the party or parties so petitioning to institute and maintain, or to continue the prosecution of such action in the name of said assignee or receiver, and for the benefit of said estate, and if said party or parties so petitioning shall furnish security or indemnity for costs and expenses as the Court may direct, the said Court shall thereupon require said assignee or receiver to forthwith prosecute such action, or in its discretion may permit such party or parties so petitioning to institute and prosecute or continue the prosecution of the same as aforesaid.

SECTION 11. If, after the payment of all the expenses of such assignment or receivership, and all indebtedness of and claims against said corporation proved or allowed in said proceedings, there shall remain any surplus money or property in the hands of the assignee or receiver, the same shall be distributed under the direction of said Court, and in such a manner as may be just and equitable, among those stockholders who have paid the assessments levied against their stock as herein provided. And any stockholder who has so paid such assessments levied against his stock shall, in addition to any remedy herein provided for, be entitled to enforce contribution from stockholders who have not paid such assessments, and for that purpose may be

subrogated to the rights of the creditors of said corporation against such defaulting stockholders, in such manner and to such extent as may be just and equitable.

SECTION 12. Whenever, in a proceeding heretofore instituted under the then existing laws of this State to enforce the liability of stockholders of any such corporation, a portion of the amount for which the stockholders of such corporation are liable has been collected, but the amount so collected is insufficient to pay and discharge claims against said corporation in full, and there remain stockholders who were not made parties to such proceedings, then, notwithstanding final judgment may have been rendered and entered in said proceeding against those stockholders who were made parties thereto, the District Court having jurisdiction may proceed as in this act provided and may levy assessments in the manner herein prescribed to such extent as may be necessary to satisfy and discharge in full all claims against said corporation and all expenses of such proceedings. And the assignee, or receiver, or the receiver appointed by said Court in such proceeding, may institute and maintain actions to recover the amount of such assessments in the same manner, with the same effect, as in the case of an assessment levied as provided in the preceding sections of this act, and all the provisions of this act shall apply to any stockholder who has paid, or from whom has been collected, in the course of such prior proceeding, any portion of the amount for which he is liable for or on account of the stock held or owned by him, shall be credited upon any assessment levied against said stock as in this section provided with the full amount so paid by or collected from him.

SECTION 13. This act shall not apply to any action now pending to which stockholders of such corporations have been made parties under the provisions of chapter seventy-six (76), General Statutes, of eighteen hundred and ninety-four (1894) and acts amendatory thereto, and in which the issue as to who are stockholders has heretofore been tried and determined by the courts; except that after final judgment in such action, if a proper case exists under the provisions of section twelve (12) of this act, the Court and parties may proceed in the manner prescribed by said section twelve (12).

SECTION 14. All acts and parts of acts inconsistent herewith are hereby repealed.

SECTION 15. This act shall take effect and be in force from and after its passage.

Approved April 18, 1899.

On March 4, 1901, while the property of the corporation was in the possession of the receiver in the foreclosure action, the Merchants' National Bank, of St. Paul, Minnesota, brought an action against the company to recover upon a renewal note given for money claimed to have been loaned the company twelve years before, in 1889 (p. 47), and in that action recovered judgment on May 6, 1901, for the sum of $2,938.07. Executions being returned unsatisfied, the Bank, as a judgment creditor, instituted an action, professedly under the provisions of chapter 76 of the General Statutes of Minnesota for 1894, quoted above (p. 58), for the sequestration of the property of the company and the appointment of a receiver.

The sequestration action was brought in the District Court of Washington County, Minnesota, on August 15, 1901 (p. 51), after the foreclosure sale. The complaint first sets forth the judgment obtained by the Bank, and the return of executions thereon, and alleges "that the said defendant corporation has no property out of which the said judgment can be satisfied" (pp. 47, 48). It then refers to the mortgage and the foreclosure action, and alleges that "all of the property of said defendant corporation, of every kind and nature and wheresoever situated, was sold by said special master. * * * That by reason of such foreclosure sale the defendant has no property whatsoever out of which the judgment of the plaintiff or any part of the same can be paid or satisfied (p. 49)." The complaint then sets forth the amount of stock outstanding, and an indebtedness to other creditors in excess of $300,000, and avers that the creditors are without remedy unless a receiver be appointed to sue the stockholders.

The summons and complaint in this sequestration action were served upon E. D. Buffington, who had been secretary and general manager of the company, and receiver in the foreclosure action, and who was also a creditor of the company in the sum of $65,725.50. Buffington did not inform any

of the other officers or directors of the company of the bringing of the action, and none of them knew of it. He simply handed the summons and complaint to one S. Blair McBeath, who had acted as attorney for the company in the foreclosure action and in other matters, and requested him to appear for the company (pp. 51, 53).

On the following day, August 16, 1901, McBeath, without any other authority or instructions, appeared in the District Court on behalf of the corporation, and thereupon, and without notice to any one else, a decree was forthwith made sequestering the property of the corporation, and appointing Theodore R. Converse, the plaintiff here, receiver of the property of the corporation. By this decree the Court undertook to invest the receiver "with full authority to sue for, collect, recover, compromise, and settle any and all stockholders' liability that may exist under the constitution and laws of the State of Minnesota or otherwise, and to prosecute and sue for the amount of such liability or any assessments that may be made by this Court on account thereof for the satisfaction of the claims of the creditors of said defendant, and of the expenses of the administration of this trust, including the fees, allowances, and expenses of said receiver and his counsel, with full power and authority, to sue for and enforce the collection of any assessments or stockholders' liability either in the courts of the State of Minnesota or the courts of any other State or territory or the courts of the United States, sitting in any State or territory of the United States." The decree further provided that "In addition thereto the said receiver is hereby vested with all the usual and ordinary powers of receivers in equity." It directs the receiver to take into his possession any assets he may learn of, and to hold all moneys he may collect from stockholders' liabilities or otherwise, "until the further order of this Court, except that said receiver is authorized out of any such funds to pay, first the current expenses incident to the creation or administration of this trust, including the compensation of such attorneys, agents, and employees as he may employ to aid him in administering the said trust, and enforcing the said assessments and stockholders' liability" (pp. 53-55).

The receiver qualified under this decree (p. 56). No property or assets of the company at any time came into his hands (p. 27).

On September 3rd, 1901, the District Court which appointed the receiver made an order on his petition, requiring creditors of the company to prove their claims and become parties to the action within six months after the publication of the order, and decreeing that the order should be published, and also copies mailed to the creditors (p. 56). This order did not require any notice to stockholders, and none was in fact given (p. 57).

A number of persons claiming to be creditors presented claims which were allowed by the Court to the amount of $443,752.17, including interest to December 11, 1902 (p. 57). The greater portion of these claims were based on renewal notes given for debts of the company contracted in the years 1893 and 1894, and in some cases even before that (pp. 101-114).

On April 16, 1902, the receiver filed his petition in the District Court, praying for an assessment upon the stockholders. It recites the appointment of the receiver; the bringing of the sequestration action under the provisions of chapter 76 of the General Statutes of Minnesota of 1894; the mortgage foreclosure; the appointment, in the foreclosure suit, of a receiver of all the property of the corporation; the foreclosure sale, and that by reason thereof the corporation "is wholly without assets or property of any sort or nature out of which the claims of the creditors of the said defendant or any part of such claims can be paid, collected or realized." It then recites the notice to creditors to prove claims, and that creditors for $381,725.79 have become parties, and creditors in the further sum of $23,679.15 have not become parties. It states that the stockholders are liable "to an amount not exceeding the par or face value of the stock held by said stockholders respectively, for the satisfaction of the claims of the creditors"; that there are outstanding 27,967 shares of preferred stock, and 42,594 shares of common stock, some of which are held in the names of trustees; that the receiver "shortly after his appointment commenced a thorough investigation as to the stockholders of said defendant, and as to their solvency

and ability to respond to such assessment as this Court may order;" that such investigation showed that 18,801 shares of preferred stock, and 9,877 shares of common stock were held by persons able to pay an assessment, in addition to 3,548 shares of common stock held by trustees for solvent beneficiaries, and in addition to some others who might be able to respond to an assessment. The petition closes with the following averment: "Your petitioner further avers that he has already incurred a very considerable expense in conducting the examination necessary to properly advise this Court as to the situation regarding said stockholders and their solvency, and that it is impossible at the present time to determine the expense of administering this trust and collecting the liability of the stockholders for the benefit of the creditors herein, but your petitioner avers that owing to the fact that legal proceedings will have to be instituted in many different States and in many different counties of different States and against so large a number of stockholders, and in view of the fact that the amount involved in such litigation is large and the responsibility of the same is great, that in considering the amount for which assessment should be levied a very considerable sum must necessarily be added for the expense of collection and administration." The petition prays for an assessment "for the purpose of providing funds for the payment of the expenses of this receivership, in the enforcement of such stock liability, and for the payment of the indebtedness of said defendant" (pp. 57-65).

On this petition, the District Court, on December 22, 1902, made an order assuming to levy the assessment of $18 a share, to recover which these actions were brought (pp. 65-67). That order recites the making of a prior order on April 16, 1902, the same day on which the petition for the assessment was presented, and that copies of that order "were duly published, mailed and served in the manner therein prescribed." The order of April 16, 1902, is not in the record, and it does not appear what kind of notice, if any, it required to be given to the stockholders; but this is not material, so far as these defendants are concerned, inasmuch as it is conceded that the defendants are not and never had been residents of the State of Minnesota, and were not parties to and had no knowledge

in fact of the proceedings wherein the assessment sued upon was made (p. 41).

A few of the stockholders appeared in the District Court, and objected to the proceedings, and after hearing their counsel and counsel for the receiver, there being no appearance by the corporation nor by any one else, the Court made its determination "that it is necessary and proper that an assessment of eighteen dollars ($18) on each share of capital stock of said corporation be directed and levied herein against all parties liable as stockholders of said defendant." The order then proceeded to direct the payment of such assessment, being 36% of the par value of the stock, directed the receiver to give notice by mail of the making of the order, and ordered him to collect the assessment, and "to forthwith institute and prosecute such action or actions or other proceedings against such person, persons, corporation or party liable in any court having jurisdiction, whether in this State or elsewhere which said receiver may deem necessary or proper for the recovery of the amount due."

Some of the stockholders who opposed the making of the order appealed from it to the Supreme Court of Minnesota, which affirmed the order (pp. 67, 68); the sole question considered in the opinion being whether the stockholders were exempt from liability on the ground that the Minnesota Thresher Manufacturing Company was a manufacturing company (pp. 68-72).

After the making of the assessment order, the receiver mailed notices of its making to the stockholders whose names and addresses were known to him (p. 67). Isaac Bernheimer had died September 5, 1893 (p. 122), and Simon Bernheimer had died April 26, 1900 (p. 98). Both had left property in Minnesota, and wills which had been there admitted to probate (pp. 98, 122). Nevertheless, the receiver, not knowing of the deaths of these stockholders, caused the notices of the making of the order to be mailed, addressed to Simon Bernheimer and Isaac Bernheimer, respectively, at 320 Broadway, New York City (p. 101). No notice or process in the name or address of these defendants, either individually or as executors, was ever issued or served or published, in the State of Minnesota, or elsewhere (p. 101).

In making the assessment order, the Court included as a basis of the assessment the expenses stated in the petition for the assessment—including estimated expenses of the receivership, of investigations as to the solvency of stockholders, of litigations in many different jurisdictions, and of administering the fund. How generously the Court allowed for these items will be seen by comparing the amount of the indebtedness which was to be paid with the amount of money to be raised. The total indebtedness allowed, including interest, amounted to $443,752.17 (p. 57). An assessment of $18 a share on the entire outstanding capital stock of 70,561 shares (p. 65) would produce $1,270,098. Taking the receiver's own *ex parte* estimate, the holders of 32,226 shares would be able to pay the assessment (pp. 63, 64). The assessment on these shares alone would produce $580,068, an excess over the amount required to pay the debts in full with interest, of $136,315.83, or over thirty per cent!

It was for the recovery of this assessment that the receiver brought these actions. The actions were commenced on January 28 and 29, 1904, respectively (pp. 73, 122). The complaint rests the cause of action squarely upon the order of assessment as on a judicial determination binding on the defendants. No facts were alleged, nor did plaintiff attempt to prove any, to show that defendants could lawfully be called upon to pay the amount of the assessment, unless by virtue of such determination (pp. 4-13); and the complaint concludes with the allegation that the amount demanded is due "in and by the authority of said last mentioned order or decree" (p. 13).

The answer admitted that the defendants' testator was a stockholder in the Minnesota Thresher Manufacturing Company, and put at issue the remaining allegations of the complaint. It also pleaded, among other defenses, that the statute under which the assessment proceedings were had, and the assessment proceedings, impaired the obligation of the defendants' contract as stockholders, and deprived them of their property without due process of law, and denied them the equal protection of the laws; that the Minnesota Thresher Manufacturing Company was a manufacturing corporation;

and that the action was barred by the statutes of limitations which will be referred to below (pp. 17-20).

The cases came on for trial before the Honorable George C. Holt, District Judge, and a jury, on March 9, 1906. At the opening of the trial, counsel for the defendants moved for a dismissal of the complaint for insufficiency, and for judgment for the defendants on the pleadings (pp. 24, 25), the grounds of which motion are more fully set forth in the assignment of errors.

This motion, under the New York practice, was equivalent to a demurrer to the complaint.

> Satterlee *vs.* Kobbe, 173 N. Y., 91, 102.
> St. Regis Paper Co. *vs.* Santa Clara Lumber Co., 173 N. Y., 149, 157.

The right to take the objection was not waived by failing to demur.

> Pope *vs.* Terre Haute Car & Mfg. Co., 107 N. Y., 61, 66.
> Kelly *vs.* Security Mutual Life Ins. Co., 186 N. Y., 16.

The motion had the same effect in the federal court sitting in New York.

> Central Transportation Co. *vs.* Pullman Car Co., 139 U. S., 24, 39, 45.
> Roberts *vs.* Lewis, 144 U. S., 653, 656, 657.

The Court reserved decision on the motion (p. 25). Plaintiff then proved the incorporation of the Minnesota Thresher Manufacturing Company, the appointment of the receiver, and the order levying the assessment, and rested (pp. 25-28). Defendants' counsel renewed the motion for a dismissal on the same grounds as before, and on the further ground of a failure of proof (p. 28). The Court again reserved decision until all the evidence should be in. Thereupon the defendants proved the remaining facts, as stated above, for the purpose of showing more clearly the invalidity of the assessment (pp. 28, 103).

At the close of the whole case, defendants' counsel renewed the motion for a dismissal upon the same grounds, together with additional grounds stated below (p. 114). The Court denied each of the defendants' motions for a dismissal, as well as a motion for the direction of a verdict for the defendants, and granted a motion for the direction of a verdict for the plaintiff, to each of which rulings defendants excepted (p. 114).

The jury, by direction of the Court, rendered a verdict for the plaintiff for $3,600 and interest in each case, upon which judgment was entered on March 14, 1906, for $4,318.07 in each case (p. 23).

By stipulation between the parties, they have agreed that the record in one case may stand as the record in both, with the changes noted in the stipulation (pp. 121-125).

These cases are brought to this court by writ of error, under the authority of the sixth paragraph of the enumeration in Section 5 of the Act of Congress of March 3, 1891, establishing the Circuit Courts of Appeals (26 Stat. at L., ch. 517, p. 827), which permits such writ in any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States.

In such a case, the writ brings up the entire record, and this Court determines not only the constitutional question, but every question in the case.

Holder *vs.* Aultman, Miller & Co., 169 U. S., 80, 88, 89.

Loeb *vs.* Trustees of Columbia Township, 179 U. S., 472, 480, 481.

The defendants duly filed the following

Assignment of Errors.

(1) The Court below erred in denying the motion of the plaintiffs in error made upon the opening of the trial for a dismissal of the complaint and for judgment for the plaintiffs in error, the defendants below, on the following grounds:

1. That the complaint does not state facts sufficient

to constitute a cause of action in favor of the plaintiff against the defendants.

2. That Chapter 272 of the General Laws of Minnesota of 1899 under the alleged authority of which the assessment here sued upon is claimed to have been levied, contravenes the provisions of Section 10 of Article I of the Constitution of the United States, in that it impairs the obligation of the contracts of the stockholders of the Minnesota Thresher Manufacturing Company, and of the creditors of the said corporation, and particularly of the defendants' testator and of these defendants as his executors.

3. That these defendants were not parties to the proceeding in which the said assessment was assumed to be levied, and are not bound thereby.

4. That the said Chapter 272 of the General Laws of Minnesota of 1899, and all proceedings had thereunder, so far as it is sought thereby to charge with liability or to affect these defendants, or to take their property in the amounts and for the purposes mentioned in the complaint, contravene the provisions of Section 1 of Article XIV of the Amendments to the Constitution of the United States, in that they deprive the stockholders of said corporation, who were not parties to the said proceedings, nor heard therein, nor served with process therein, and particularly these defendants, of property without due process of law, and deny to them the equal protection of the laws.

5. That the District Court of Washington County, Minnesota, had no jurisdiction to entertain the said proceedings or to appoint a receiver, or to levy an assessment therein, because the proceeding in said court was not a proceeding of the nature contemplated by, or instituted in the manner directed in, said Act of 1899, or Chapter 76 of the General Statutes of Minnesota.

6. That the plaintiff has no such title or interest as gives him a standing to maintain this action in a court of a jurisdiction other than that in which he was appointed.

7. That the said Minnesota Thresher Manufacturing Company was a corporation organized for the purpose of carrying on a manufacturing business, and its

stockholders are exempt from liability under the provisions of Section 3 of Article X of the Constitution of the State of Minnesota.

8. That this action was not brought within two years after these defendants or their testator ceased to be stockholders in said corporation, within the meaning of Section 55 of the Stock Corporation Law of the State of New York.

(2) The Court below erred in denying the motion of the plaintiffs in error, made at the close of the plaintiff's case for a dismissal of the complaint and for judgment for defendants upon all of said grounds and on the additional ground that no cause of action had been pleaded or proved.

(3) The Court below erred in denying the motion of the plaintiffs in error made at the close of the evidence for a dismissal of the complaint on all of said grounds and on the following additional grounds:

9. That no cause of action had been pleaded or proved.

10. That the cause or causes of action on many of the claims to pay which the said assessment was levied, accrued more than six years before the commencement of this action.

11. That no judgment against the said corporation was obtained on many of the claims to pay which the said assessment was levied.

12. That many of the alleged debts to pay which the said assessment was levied were not payable within two years from the time they were respectively contracted.

13. That no action was brought against the said corporation upon many of said debts within two years after they became due.

(4) The Court erred in refusing to direct a verdict in favor of the plaintiffs in error, the defendants below on all the grounds heretofore stated.

(5) The Court erred in granting the motion of the defendant in error, the plaintiff below for a direction of a ver-

dict in favor of said plaintiff and against said defendants, and in directing such verdict as aforesaid.

(6) The Court erred in rendering a judgment in favor of the defendant in error and against the plaintiffs in error.

(7) The Court erred in refusing to hold that the Laws of Minnesota for 1899, being Chapter 272 of said laws, are in contravention of the Constitution of the United States.

(8) The Court below erred in holding that the plaintiff might recover interest, and in including interest in said judgment rendered herein, and in giving judgment in favor of the plaintiff and against the defendants for too great an amount.

(9) The complaint does not support the judgment.

(10) The said judgment was given in favor of the said Theodore R. Converse, as Receiver of the Minnesota Thresher Manufacturing Company, defendant in error, the plaintiff below and against the said Mayer S. Bernheimer and Lorin S. Bernheimer, as surviving executors of the last will and testament of Simon Bernheimer, deceased, the plaintiffs in error, the defendants below whereas by the law of the land it ought to have been given in favor of said defendants and against the said plaintiff (pp. 115-117).

State of the decisions regarding the law of Minnesota and the assessment here in suit.

At the time when the defendants' testators acquired their stock, in 1885, the only decision construing the provisions of the Constitution and statutes of Minnesota imposing a double liability on stockholders, was the case of *Allen vs. Walsh*, 25 Minn., 543, which held that the Constitution and the statute must be construed together.

Between 1885 and 1899 there were many decisions of the courts of Minnesota on this subject. These decisions, while of great persuasive force, were not in existence when the contract of subscription for shares was made, and did not enter into that contract, and are not binding on this court; but this

court has repeatedly held that it will determine for itself what was the defendants' contract.

Burgess *vs.* Seligman, 107 U. S., 20, 33, 34.
Brunswick Terminal Co. *vs.* National Bank, 192 U. S., 386, 396.
Great Southern Hotel Co. *vs.* Jones, 193 U. S., 532, 542-548, and cases there cited.

The Minnesota decisions here referred to agree, as to the nature of the liability, with the decisions of this court regarding similar liabilities. They hold, in substance, that the double liability of stockholders under the laws of Minnesota is in its nature a liability on the part of all the stockholders to contribute ratably, not in excess of the stock owned by them, to a common fund for the benefit of all the creditors of the corporation, for the purpose of making good any deficiency in the corporate assets for the payment of the corporate debts; a liability which can be justly enforced only by a proceeding in equity, to which all the creditors and all the stockholders are parties, to the end that the liability may be properly apportioned among the stockholders, and the fund resulting therefrom may be properly apportioned among the creditors; and that as no other form of remedy is appropriate to a liability of this nature, the remedy described is the exclusive remedy.

Patterson *vs.* Stewart, 41 Minn., 84.
In re Martin's Estate, 56 Minn., 420.
Winnebago Paper Mills *vs.* Northwestern Printing & Publishing Co., 61 Minn., 373, 376.
National New Haven Bank *vs.* Northwestern Guaranty Loan Co., 61 Minn., 375.
Hanson *vs.* Davison, 73 Minn., 454.

The same view was taken by this court in passing on the provisions of the Constitution and laws of Minnesota on this subject, and this court held that the double liability of stockholders in Minnesota corporations was of such character as not to be enforceable by an action to which the stockholders were not parties, nor by an action against an individual stockholder.

Hale *vs.* Allinson, 188 U. S., 56.
Finney *vs.* Guy, 189 U. S., 335.

The act of 1899 entirely changed this rule. The constitutionality of that statute has been upheld by the Supreme Court of Minnesota, holding that the only change effected was a change in the remedy which did not impair the obligation of the stockholders' contract, and that the stockholders are deemed to be represented by the corporation in the assessment proceedings, and so are parties.

Straw & Ellsworth Mfg. Co. *vs.* Kilbourne Boot & Shoe Co., 80 Minn., 125.
London, &c., Mtg. Co. *vs.* St. Paul Park Improvement Co., 84 Minn., 144.

It is needless to argue the point that these decisions are not binding on this court.

The question of the constitutionality of the act of 1899 was presented to Judge Lowell in

Robinson *vs.* Brown, 126 Fed., 429.

The court there simply stated, without discussing the constitutional questions, that it was disposed to agree with the decision of the Minnesota Supreme Court. The constitutional question was only one of a number of questions raised by the defendant stockholder in that case, and appears to have been abandoned on his appeal to the Circuit Court of Appeals for the First Circuit. That court affirmed the judgment, on the authority of *Hale vs. Hardon*, 95 Fed., 747, which sustained the receiver's right to sue an individual stockholder under the law as it existed prior to 1899.

Burget *vs.* Robinson, 113 Fed., 669.

Meanwhile, the Circuit Court of Appeals for the Third Circuit had, in *Hale vs. Allinson,* 106 Fed., 258, denied the receiver's right under the former law to maintain such actions, and the same result had been arrived at by the Circuit Court of Appeals for the Second Circuit in *Hilliker vs. Hale,* 117 Fed., 220. These two cases were brought to this court by

certiorari, and their doctrine approved, and the holding in *Hale vs. Hardon* overruled.

Hale *vs.* Allinson, 188 U. S., 56.

The defendant in the *Burget* case also applied to this court for *certiorari,* basing his contention not on any constitutional ground, but on the ground that his case was governed by the decision in *Hale vs. Allinson.* It was evident, however, that an action under the former law, and an action under the new statute, involved quite different questions; and these questions this court, by denying the petition for *certiorari* in the *Burget* case, decided not to determine at that time.

Burget *vs.* Robinson, 188 U. S., 739.

No constitutional question was raised in that case, either in this court, or in the Circuit Court of Appeals.

This was the state of the decisions when the assessment here in suit was levied. The receiver has brought numerous actions in different jurisdictions to recover the amount of the assessment from individual stockholders. A number of these actions have not yet been brought to trial, but are held awaiting the decision of this court in the cases now before it. Some of them, however, have been carried to final judgment, and in each of these cases, the determination of the highest court which has yet passed on the questions involved has been in favor of the stockholders and against the right of the receiver.

Converse *vs.* Aetna National Bank, 64 At., 340.
Converse *vs.* Stewart, 105 N. Y. App. Div., 478.

In *Converse vs. Aetna National Bank, supra,* the court below rendered judgment in favor of the receiver, which was reversed by the Supreme Court of Errors of Connecticut. The opinion of the court is written by Mr. Justice Simeon E. Baldwin. The chief ground of the decision is that the act of 1899 is unconstitutional in that it impairs the obligation of the stockholders by adding to their liability for corporate debts a liability for the expenses of the receivership; but the opinion points out several other objections to the statute.

In *Converse vs. Stewart, supra,* Hon. William G. Choate,

referee, had held in favor of the receiver, substantially on the same grounds taken by the Minnesota Supreme Court; but the Appellate Division of the Supreme Court, an intermediate appellate tribunal, reversed the judgment, and ordered a new trial. Four justices sat in the case, all of whom concurred in the decision in favor of the stockholder; but the opinion, which was concurred in by only two of them, held that the defendant, as a beneficial holder of the stock, was not liable, and that not having been a party to the assessment proceedings, he was not bound by the assessment order. The new trial was had before Hon. William N. Cohen, as referee, who decided in favor of the defendants on the authority of the decision of the Appellate Division; and the Appellate Division reaffirmed its decision by a decision affirming this judgment, rendered February 8, 1907, and not yet reported.

The same result was reached in the case of *Converse vs. Ayer*, decided in the Superior Court for the County of Suffolk, Massachusetts, a court of original jurisdiction, on January 2, 1906. An appeal from that decision is now pending in the Supreme Judicial Court of Massachusetts, awaiting the decision of this court in the cases now before it. The decision is not reported, but counsel have been furnished with a copy of the memorandum handed down by Hon. Jabez Fox, the judge who tried the case, as follows:

> "I find for the defendant on the ground that the Act of 1899 imposes new burdens upon the stockholders in that it provides for an assessment which shall cover not only the debts of the corporation, but the probable expenses of collecting the assessment, and provides further that such assessment shall be conclusive as to all the stockholders, including those who are not notified of the proceedings and are not within the jurisdiction of the court. Undoubtedly a stockholder may agree to submit to a foreign assessment, just as he may appoint an attorney, to accept service in a foreign jurisdiction, and this is all that Howarth-Lombard decides. But the scope of his agreement is to be determined by the state of the law at the time of his subscription."

The constitutional questions now before the court were presented to this court, in an action on this same assessment against another stockholder of the Minnesota Thresher Man-

ufacturing Company. The Court held that the stockholder there, which was a national bank, had no power to subscribe for shares, and consequently could not be liable as a shareholder. It therefore declined to pass on the constitutional questions, as they were not necessary to the decision of the case then before it, and directed judgment in favor of the stockholder.

First National Bank of Ottawa *vs.* Converse, 200 U. S., 425.

Similar questions were presented to this court, and expressly left open, in

Evans *vs.* Nellis, 187 U. S., 271.

In that case, the Circuit Court had held unconstitutional, upon substantially the grounds here taken by the plaintiff in error, the act of Kansas, passed in 1899, which changed the law as to the double liability of stockholders in Kansas corporations (*Evans vs. Nellis*, 101 Fed., 920). The Circuit Court of Appeals certified to this Court the question of the constitutionality of the statute. This Court determined that the action there before it could not be maintained, because the receiver in that case had not complied with the provisions of the act itself, and consequently it became unnecessary to determine the constitutional questions certified. In so deciding, Mr. Justice White, speaking for the court, made the following statement at page 208:

> "Of course, in answering this question, we express no opinion whatever as to how far, if at all, the act of 1899 could validly operate to repeal the right of action in favor of creditors given by the Kansas statute of 1868, so far as creditors are concerned, whose debts accrued prior to the repeal. We of course also express no opinion whatever upon the question of how far the rights and remedies conferred by the act of 1899 could lawfully be enforced against stockholders in corporations who became such stockholders prior to the passage of that act. And this of course excludes the intimation of any opinion as to how far the judgment rendered in the court of Kansas in a suit brought by a receiver against the corporation and the resident stockholders, to fix the sum required to pay the corporate debts,

would be binding upon non-resident stockholders not directly a party to such action, especially where their subscription to stock had been made prior to the enactment of the act of 1899."

These questions, thus expressly left open, are the precise questions which are now squarely presented to this Court for decision with respect to the Minnesota Act of 1899. Our contention is that while the precise questions have not been determined by this Court, the application of principles long established and well settled will necessarily lead to a determination against the constitutionality of the act in question.

POINTS.

I.

The statute of 1899, under which the proceedings for the assessment were taken, impairs the obligation of the contract between the stockholders and the creditors.

That the liability now in question is a contractual liability is alleged in the complaint (p. 9), and is settled by authority.

Hanson *vs.* Davison, 73 Minn., 454, 460.
Flash *vs.* Conn, 109 U. S., 371, 377.
Hawthorne *vs.* Calef, 2 Wall., 10.
Whitman *vs.* Oxford National Bank, 176 U. S., 559, 563.
Knickerbocker Trust Co. *vs.* Myers, 133 Fed., 764, affirmed,
Myers *vs.* Knickerbocker Trust Co., 139 Fed., 111, 112, 114.
Carroll *vs.* Green, 92 U. S., 509, 513.

The terms of the stockholders contract are embodied in the constitution and statutes in force at the time when he acquired his stock.

Von Hoffman *vs.* City of Quincy, 4 Wall., 535, 550.
Webster *vs.* Bowers, 104 Fed., 627.

The constitution and the statute are to be construed together.

Allen *vs.* Walsh, 25 Minn., 543, 551.
Whitman *vs.* Oxford National Bank, 176 U. S., 559, 563.
Middletown National Bank *vs.* Toledo, &c., Ry. Co., 197 U. S., 394, 405.

The provisions creating the liability are to be strictly construed, and cannot be extended beyond the words used.

Brunswick Terminal Co. *vs.* National Bank of Baltimore, 192 U. S., 386, 390.
Converse *vs.* Aetna National Bank, 64 At., 341, 344.

The question whether the statute of 1899 impaired the obligation of the contract, is not complicated in the case at bar by any reserved right to alter, amend or repeal corporate charters, as no such right is reserved by the constitution or statutes of Minnesota.

The statute of 1899 changed the contract of the stockholders and impaired its obligation in the following important respects:

(1) It added to the liability of the stockholders the costs and expenses of the receivership, whereas before, they had been liable only for the deficiency in assets to pay the debts owing to creditors.

(2) It added to the liability of the stockholders claims against the corporation other than its debts, and liabilities incurred after the corporation has been put into liquidation by the court.

(3) It added to the liability of the stockholders such amounts as the court might estimate as "probably" required

to meet a probable deficiency in the amount which may be realized "within a reasonable time" from the "probable amount" of assets, for the payment of the "probable indebtedness."

(4) It added further the "probable expenses of collecting the assessment" from other stockholders, taking into account the "probable solvency or insolvency of stockholders."

(5) It changed the entire nature of the liability from a liability to all the creditors, generally, enforceable only in an action in equity at the corporate domicile with all stockholders and creditors as parties, to a liability which can, at least as to non-resident stockholders, be fixed by proceedings to which they are not parties, and of which they have received no notice, and permits the liability so fixed to be enforced by an action against any one stockholder by a receiver in a court of law at the domicile of the stockholder.

(6) It deprived the stockholders of their right to be heard regarding the claims of creditors as well as of the right to vested defenses against such claims.

(7) It changed the liability from a liability to the creditors, to a liability to a receiver to be appointed by the court.

(1) THE ADDITIONAL LIABILITY FOR EXPENSES OF THE RECEIVERSHIP (Section 3).

Under the law, as it was before, stockholders could not be made liable otherwise than to the creditors for the deficiency in their debts. They were not responsible for the expenses of a receivership or for the receiver's commissions, nor could they be held for the expenses of the receiver in prosecuting actions in other jurisdictions.

It may be argued that the corporate assets might be used to cover the expenses of the receivership, and if what remained was insufficient to pay the corporate debts, the stockholders would be liable for the deficiency, and so, in a sense, they might be made to incur the burden of the expense of the receivership. The answer to this is that that burden could be imposed only to the extent of the sufficiency of the corporate assets to meet the expenses of the receivership. In

a case where there were no corporate assets, or not enough to pay the receiver's expenses and commissions, the creditors could in no event have been liable for the deficiency, but only for the amount of debts actually due creditors.

It will also be argued, that the costs and expenses of the receivership are properly chargeable against the stockholders, as an incident of the proceedings to collect the assessment. This argument would be sound, if each stockholder's liability for costs were limited to those incurred in the suit against him; but no new legislation would have been necessary to accomplish this result, for costs of suit have always been imposed on unsuccessful litigants. The additional burden which the statute imposes on the stockholder is the liability to pay expenses incurred by the receiver in making investigations and bringing and conducting suits, successful or unsuccessful, against other stockholders, as well as all other expenses incurred by him for any purpose whatever. The distinction between such a liability and the ordinary liability for costs, was clearly pointed out by this court in

Richmond *vs.* Irons, 121 U. S., 27, 65, 66.

See also

Matter of Thompson, 184 N. Y., 36, 45.

The imposition of this additional liability was held to impair the obligation of the contract, in

Converse *vs.* Aetna National Bank, 64 At., 341, 343, 344.

The opinion of Mr. Justice Baldwin in that case clearly points out how this provision increases the stockholder's burdens.

How greatly the stockholders' burdens have been actually increased in the case at bar under the authority of the provision in question, is shown by the record. The figures summarized above show that out of $580,068 expected to be realized from solvent stockholders, only $443,752.17 represents actual indebtedness, to which has been added $136,315.83, or over 30%, for receiver's expenses. About one-fourth of the

amount of the assessment, therefore, represents the amount which the stockholders are called upon to contribute to the expenses of the receivership—so that, in each of the judgments here rendered of $4,318.07, the defendants are called upon to pay to the receiver $1,000, which they would not have been obliged to pay if this statute had not been passed.

Nay, more: by the decision of this court in *First National Bank vs. Converse*, 200 U. S., 425, the National banks are relieved from liability, as stockholders. The holdings of National banks included in the list of stockholders (pp. 73-78) are estimated at 11,946 shares, out of 32,226 solvent stockholders, as estimated by the receiver, or more than one-third of the total holdings. In order to pay the amount called for by the court, the receiver will doubtless call upon the Minnesota court for another *ex parte* order increasing the assessment on the remaining stockholders by upwards of 50%, to meet the deficiency arising from the decision of this court; and in that assessment these defendants will be called upon to pay the receiver's expenses of preparing for and prosecuting the unsuccessful suits against the banks. If the suits had been brought by creditors under the former law, will it be supposed for one moment that the defendants could have been compelled to compensate the creditors for the expenses and costs of unsuccessful suits against other defendants?

(2) THE ADDITIONAL LIABILITY FOR CLAIMS OTHER THAN CORPORATE DEBTS, AND FOR LIABILITIES INCURRED AFTER LIQUIDATION.

The former act provides for an assessment of stockholders only "if the property of such corporation is insufficient to discharge its *debts*" (Chapter 76, General Statutes, Section 5909). The new act provides for the appropriation of the assessment levied to the payment of "all indebtedness of *and claims against* said corporation, proved or allowed in said proceedings" (Section 11). This adds to the liabilities assumed by the stockholder to pay the debts of the corporation, a liability to pay any claims against it, as, for example, for torts or claims for damages of any kind, not incurred in the regular course of the corporation's business.

1 Cook on Corporations (5th edition), section 217.

Taylor on Private Corporations (5th edition) section 734.
Child *vs.* Boston & Fairhaven Iron Works, 137 Mass., 516.
Bohn *vs.* Brown, 33 Mich., 257.
Zimmer *vs.* Schleehauf, 115 Mass., 52.
Doolittle *vs.* Marsh, 11 Neb., 243.
Cable *vs.* Gaty, 34 Mo., 573.

There is also a material difference between a liability incurred by the corporation as a going concern for which the stockholders are properly liable, and the liability which some receiver may be incurring while the corporation is in liquidation. The new act makes the stockholders liable indiscriminately for all claims which may be proved in such liquidation proceedings.

See

Danforth *vs.* National Chemical Co., 68 Minn., 308.
Richmond *vs.* Irons, 121 U. S., 27, 60, 61.
Schrader *vs.* Bank, 133 U. S., 67, 77.
Moss *vs.* Whitzel, 108 Fed., 579.

(3) THE ADDITIONAL LIABILITY FOR "PROBABLE" DEBTS TO MEET A "PROBABLE" DEFICIENCY.

The statute provides (Section 3) that the court shall determine from such proofs by affidavit or otherwise as may be offered, as to the "probable indebtedness" of the corporation, and the "*probable* amount" of assets available for that purpose, and in case it determines that such amount as may be realized from the assets "*within a reasonable time*" will "probably be insufficient" to pay these probable debts and expenses, the court has authority to order such proportionate assessment "as the court in its discretion may deem proper (taking into account the probable solvency or insolvency of stockholders and the probable expenses of collecting the assessment); and shall direct the payment of the amount so assessed against each share of said stock to the assignee or receiver within such time thereafter as said court may specify in said order."

In other words, it is left to the discretion of one judge to order and adjudge each stockholder to pay such an amount as he may deem proper on his estimate of "probable" indebtedness and expenses.

Contrast this with the liability assumed by the contract of the stockholder, to contribute his share or "so much thereof *as is necessary to satisfy the debts of the company*" (Chapter 76, General Statutes, Section 5909).

The Supreme Court of Minnesota has held that this liability is properly fixed in the equity proceedings contemplated by Chapter 76, by rendering judgment declaring each stockholder liable to the full amount of stock held by him, but that the court should levy and collect, from time to time, *only so much as should be actually required* to pay the debts and the costs of the action. The Court pointed out that it would be oppressive and improper to render an absolute judgment for any greater amount.

Harper *vs.* Carroll, 66 Minn., 487, 494, 495.

The same rule has been recognized and applied by this court.

Godfrey *vs.* Terry, 97 U. S., 171, 176, 177.

This method of action carefully protected the stockholder's right to have his liability confined to so much as was absolutely necessary to pay the debts. How different is the proceeding upon which it is now sought to hold the defendants, whereby the court, without the presence of the particular stockholder, and without hearing him, has assessed an arbitrary amount against his stock, an amount far in excess of his *pro rata* share of the actual indebtedness, and directs the receiver to sue the stockholder in his home State and to collect from him *the entire amount* so assessed.

In this respect the case differs from

Commonwealth *vs.* Cochituate Bank, 3 Allen, 42, 45.

In that case the court upheld a new statute providing for an assessment to make up a "probable deficiency," on the

ground that the statute meant only that, after hearing all parties, the court should assess "such sum as is actually required to discharge the claims of bill holders, or to approximate as near as may be to that sum;" and the court further said:

"If this language is to be understood to warrant an assessment upon stockholders beyond the real deficiency in the assets to discharge all claims of bill holders, it would be a change unwarranted as to liabilities of the stockholders that had accrued before the passage of the statute."

This is exactly the meaning of the language used in the Minnesota statute, as construed by the Minnesota Court, and consequently the case cited is direct authority to the effect that the statute is unconstitutional.

The judgment here sued upon does not even pretend to determine that the payment of this amount will be required for the purpose for which the stockholders, by their contract, agreed to pay. It determines only that in the opinion of the court that it is a proper amount and will "probably" be required,—not that it is actually required.

Nor does the statute limit the assessment to the amount that will probably be required to pay debts actually allowed, but it authorizes an assessment for the amount that will probably be required to pay the *probable* indebtedness; thus including claims that may never be proved, and, so will not be entitled to participate in the proceeds of any assessment.

Palmer *vs.* Bank of Zumbrota, 72 Minn., 266, 280.
Richmond *vs.* Irons, 121 U. S., 27, 66.

And whereas the original contract required the stockholders to pay only in case of an *actual deficiency of assets*, the new statute requires them to pay in case such amount as may be realized from the *ordinary assets* of the corporation *within a reasonable time* will *probably* be insufficient to pay the indebtedness *without delay*.

Under this provision, a corporation may, as is often the case, have assets that are amply sufficient to pay the debts. In such a case there would have been no liability at all under the former statute. Under the new statute, it needs only the determination of one judge that the assets will probably not

bring enough within a reasonable time to pay the probable indebtedness, to impose on the stockholders a liability that was never contemplated: and instead of being secondarily liable after the corporate assets are exhausted, they may be at once called on to pay as principal debtors.

It is submitted that this provision works a vital change in the contract.

(4) THE ADDITIONAL LIABILITY FOR THE PROBABLE EXPENSES OF COLLECTING FROM OTHER STOCKHOLDERS.

The imposition of this additional burden has been regarded as sufficient to invalidate the statute and the assessment here in suit, by the Connecticut and the New York Court.

> Converse *vs.* Aetna National Bank, 64 At., 341, 344.
>
> Converse *vs.* Stewart, 105 App. Div., 478, 486.

The Connecticut court particularly pointed out that the stockholder, in agreeing to become liable for a deficiency to pay debts, did not agree that "there might be added to the liabilities which it had thus assumed a liability measured by the estimate of the court as to what might be thereafter necessary for future expenses of future suits to collect what were never corporate assets."

The injustice of thus increasing the stockholders' burdens is strikingly exemplified by the large amount which, as shown above, has been imposed in the case at bar to cover such probable expenses.

(5) THE CHANGE IN THE NATURE OF THE LIABILITY.

The changes thus far discussed consist in *adding to the liabilities* assumed by the stockholders. The change now under consideration is more comprehensive. It consists in *changing the character of the liability.*

A comparison of the liability under the former law with that created by the new statute, will at once demonstrate the fundamental nature of the change.

Under the former law	Under the Statute of 1899
the liability was one from *all* the stockholders	the liability is one from *each* stockholder
to *all the creditors*	to a receiver representing, not the creditors, but the corporation
to pay each his *pro rata* share	to pay a fixed sum, estimated as his probable share
of the *actual deficiency* in assets to pay debts	of the *probable* deficiency in the amount that may probably be realized in a reasonable time from the ordinary assets, to pay probable debts, claims and expenses of the receivership
as determined by a court of equity, after hearing all the stockholders and all the creditors,	as assessed *ex parte* by a single judge, without hearing the stockholders,
with no liability on the part of stockholders not made parties.	such assessment being a liability conclusively determined against every stockholder, though not a party.

This is much more than a change in the remedy; it goes to the very substance of the contract, and substitutes a liability of one kind for a liability of a different kind.

Contract rights and liabilities may not be changed indirectly, under the guise of a change in the remedy, any more than they may be changed directly by declaring them to be altered. Nothing is more vital to a right than the remedy by which it is sanctioned and enforced. Without a remedy, a so-called right is an empty name. By taking away the remedy for enforcing a right, the right itself may be destroyed.

By giving a remedy where there was none before, a new right may be created. By substituting for a remedy appropriate to the enforcement of one liability, a remedy appropriate to the enforcement of an entirely different liability, a complete change in the nature of the liability may be effected. That is precisely what has been done here.

Stockholders' liabilities for corporate debts are of different kinds. The terms of the stockholder's contract are usually found in the corporate charter, or other laws under which the corporation is formed, and with reference to which the stockholders contract. A stockholder may thus agree to be answerable directly to any creditor up to a fixed amount; or he may agree to be so answerable to the corporation or its receiver; or he may agree to pay an assessment to be fixed by a court, with or without notice, or by a receiver, or in some other manner agreed upon in advance; or he may agree to pay his share of a deficiency, to be ascertained by judicial proceedings to which all the creditors and all the stockholders are parties. Each one of these undertakings differs materially from each of the others. Each must be enforced by such remedy as, from the very nature of the undertaking, is appropriate for its enforcement. The first of the liabilities enumerated is appropriately enforced by an action at law by any creditor against any stockholder; the second, by proceedings by the corporation or its receiver against one stockholder at law, or against all in equity; the third, by assessment proceedings, followed by an action at law against each stockholder, to recover the amount of the assessment; and the fourth, by an action in equity at the corporate domicile, to which all the creditors and all the stockholders are parties. One liability cannot be substituted for another without the consent of the parties; for that would impair the obligation of the contract by substituting a different contract. But if this cannot be done directly, it is clear that it cannot be done indirectly, by substituting for the remedy appropriate to the enforcement of one contract, a remedy which is adapted only for the enforcement of a different contract.

The Statute of 1899 does this very thing. The stockholders agreed to pay each his share of an actual deficiency. The amount of such deficiency, and of each stockholder's share

could, in the nature of the case, and in the absence of any statute, have been justly determined only by equity proceedings to which all creditors and all stockholders were parties; and so the laws of Minnesota provided when the contract was made, and so the courts of Minnesota, as well as this court have repeatedly held. The stockholders never agreed to pay any assessment which might be made without hearing them, whether based upon proof, or upon an estimate of probable requirements, or made arbitrarily. Yet by the Statute of 1899 the legislature of Minnesota says to the stockholders: From henceforth you will no longer pay only your judicially determined share of the actual deficiency, as determined by a court of equity after hearing all parties; but you must pay such amount as a single judge, without notice to you, "may deem proper." To this the stockholder's answer is "*Non haec in foedera veni.*" The new statute attempts to substitute for the contract which the stockholder made, one which he never agreed to. Against that attempt, the stockholders justly, it is submitted, invoke the protection of the Federal Constitution.

These conclusions are supported by many decisions of this court, of the courts of Minnesota, and of the courts of other jurisdictions, to which the length of this brief permits only a reference.

It has been repeatedly decided that the stockholders' contract here in question can be appropriately enforced only by an action in equity at the corporate domicile, to which all creditors and all stockholders are parties; and that this is so, not only because so provided by statute, but because of the very nature of the liability, so that even in the absence of the statute, that remedy would be the only appropriate and exclusive remedy for enforcing a liability of this character.

Hanson *vs.* Davison, 73 Minn., 454, 461.
Re Martin's Estate, 56 Minn., 420, 422, 423.
Patterson *vs.* Stewart, 41 Minn., 84, 91.
Winnebago Paper Mills *vs.* Northwestern Printing & Publishing Co., 61 Minn., 373, 376.
National New Haven Bank *vs.* Northwestern Guaranty Loan Co., 61 Minn., 375, 392.
Pollard *vs.* Bailey, 20 Wall., 520.

Terry *vs.* Tubman, 92 U. S., 156, 161.
Carrol *vs.* Green, 92 U. S., 509, 512.
Godfrey *vs.* Terry, 97 U. S., 171, 176, 177.
Terry *vs.* Little, 101 U. S., 216.
Flash *vs.* Conn, 109 U. S., 371, 380.
Finney *vs.* Guy, 189 U. S., 335, 340, 341.
Umsted *vs.* Buskirk, 17 Ohio St., 113.
Harris *vs.* First Parish in Dorchester, 23 Pick., 112.
Jones *vs.* Jarman, 34 Ark., 323, 339, 346.
Coleman *vs.* White, 14 Wis., 700.

The mere fact that the change in the liability was made under the guise of a change in the remedy does not justify it. The remedy existing at the time when a contract is entered into constitutes a material part of the contract.

Green *vs.* Biddle, 8 Wheat., 1, 76.
Bronson *vs.* Kinzie, 1 How., 311, 319.
McCracken *vs.* Hayward, 2 How., 608, 612.
Lessee of Gantly *vs.* Ewing, 3 How., 707, 717.
Von Hoffman *vs.* Quincy, 4 Wall., 535, 550, 552.
Gunn *vs.* Barry, 15 Wall., 610.
Walker *vs.* Whitehead, 16 Wall., 316.
Edwards *vs.* Kearzey, 96 U. S., 595.
Brine *vs.* Insurance Co., 96 U. S., 627, 637.
Seibert *vs.* Lewis, 122 U. S., 284, 294.
Barnitz *vs.* Beverly, 163 U. S., 118, 122.

A contract may be just as effectually impaired by changing the remedy as by expressly creating a new contract, and such impairment is equally within the constitutional prohibition.

Green *vs.* Biddle, 8 Wheat., 1, 84.
Bronson *vs.* Kinzie, 1 How., 311, 316-318.
McCracken *vs.* Hayward, 2 How., 608, 612-614.
Lessee of Gantly *vs.* Ewing, 3 How., 707.
Planters' Bank *vs.* Sharp, 6 How., 301, 330, 332.
Howard *vs.* Bugbee, 24 How., 461.
Von Hoffman *vs.* Quincy, 4 Wall., 535, 552-554.

Gunn *vs.* Barry, 15 Wall., 610.
Walker *vs.* Whitehead, 16 Wall., 314.
Edwards vs. Kearzey, 96 U. S., 595.
Brine *vs.* Insurance Co., 96 U. S., 627, 637.
Louisiana *vs.* Pillsbury, 105 U. S., 278.
Seibert *vs.* Lewis, 122 U. S., 284.
McGahey *vs.* Virginia, 135 U. S., 662, 693.
Barnitz *vs.* Beverly, 163 U. S., 118.

The foregoing decisions deal chiefly with legislation impairing the rights of creditors, but the same considerations apply to the rights of both parties under the contract. The Constitution protects equally the debtor and the creditor, the stockholder and the billholder.

As was said in

State National Bank *vs.* Sayward, 91 Fed., 443,

> "Somewhat anomalous and arbitrary remedies, like that existing in the constitution and statutes of the State of Kansas, have been upheld and enforced in the Federal Courts, largely *upon the ground that the stockholder submitted himself to the operation of the remedy and contracted with the public in respect to it. It could perhaps be said with consistency that creditors, on the other hand, who dealt with the corporation and voluntarily contract, are bound by the disabilities and conditions prescribed by the government creating the corporation;* and Railway Co. *v.* Gebhard, 109 U. S., 527-537, would seem to justify the position that creditors and members of the public who deal with a corporation are bound by the remedy and the liability prescribed, together with the disabilities, if any, under the laws of the State creating the corporation and prescribing the remedy. The doctrine of Railway Co. *v.* Gebhard, *supra*, which is applied to foreign creditors, must be accepted as fairly applying to home creditors, like the plaintiff in this case, who, it must be held, presumed upon the reasonable scope of the local right and the local remedy. If, therefore, the question is the lack of efficiency in the remedy prescribed by the Statute of Ohio * * * it would seem, upon reason, that *the rule which would hold the stockholder to an arbitrary and anomalous remedy, on the ground of contract, should hold the creditor to an insufficient and practically inoperative remedy upon the same ground.*"

These principles have been repeatedly applied to statutes changing the contracts of stockholders. The following decisions are authorities in favor of the contention of these defendants:

Dexter *vs.* Edmands, 89 Fed., 467.
State National Bank *vs.* Sayward, 91 Fed., 443.
Western National Bank *vs.* Reckless, 96 Fed., 70, 78.
Evans *vs.* Nellis, 101 Fed., 920; affirmed, 187 U. S., 271, without passing on the constitutional questions.
Webster *vs.* Bowers, 104 Fed., 627.
Knickerbocker Trust Co. *vs.* Myers, 133 Fed., 765; affirmed,
Myers *vs.* Knickerbocker Trust Co., 139 Fed., 111, 117.
Knickerbocker Trust Co. *vs.* Cremen, 140 Fed., 973.
Harrison *vs.* Remington Paper Co., 140 Fed., 385.
Converse vs. Aetna National Bank, 64 At., 341.
Converse *vs.* Stewart, 105 N. Y. App. Div., 478.

It is sometimes said that the remedy may be changed at will, and *dicta* to that effect are to be found in many decisions, including decisions of this court. The statement, however, is too broad, as clearly appears from the authorities cited above. The true rule, it is submitted, is, that changes even in the remedy cannot be made, which substantially affect the rights of the parties; but that, if this is avoided, the *forms* or *modes* of proceeding can be altered at the will of the legislature. The distinction, in other words, is not between right and remedy, but between substance and form. The legislature can make changes in the form of proceeding; but it cannot make any change, whether in the remedy or in any other feature of the contract, which detrimentally affects either party to the contract.

Bronson *vs.* Kinzie, 1 How., 311, 318.
Von Hoffman *vs.* Quincy, 4 Wall., 535, 554.

Tennessee *vs.* Sneed, 96 U. S., 69, 74.
Edwards *vs.* Kearzey, 96 U. S., 596, 603, 604.
Brine *vs.* Insurance Co., 96 U. S., 627, 637.
Allis *vs.* Insurance Co., 97 U. S., 144, 146.
Louisiana *vs.* New Orleans, 102 U. S., 203, 206, 207.
Penniman's Case, 103 U. S., 714, 720.
Antoni *vs.* Greenhow, 107 U. S., 769, 774.
Connecticut Mutual Life Ins. Co. *vs.* Cushman, 108 U. S., 51, 62, 63.
Virginia Coupon Cases, 114 U. S., 269, 298-300.
Fourth National Bank *vs.* Francklyn, 120 U. S., 747, 755.
Seibert vs. Lewis, 122 U. S., 284, 297, 299.
Swinburne *vs.* Mills, 17 Wash., 611, 616-622.
Second Ward Savings Bank *vs.* Schranck, 97 Wis., 250, 261-266.

The changes in remedy which have been sustained are, it is believed, confined to changes in form, which did not affect the substance.

Terry *vs.* Anderson, 95 U. S., 628, 633.
Tennessee *vs.* Sneed, 96 U. S., 69, 74.
Louisiana *vs.* New Orleans, 102 U. S., 203, 206, 207.
Penniman's Case, 103 U. S., 714, 720.
Fourth National Bank *vs.* Francklyn, 120 U. S., 747, 755.
Hill *vs.* Merchants' Ins. Co., 134 U. S., 515.
Oshkosh Waterworks Co. *vs.* Oshkosh, 187 U. S., 437, 439, 444.

Certain other decisions of this court, which have been cited in support of the proposition that the remedy may be changed at will, do not, it is submitted, support that proposition.

In *Ewell vs. Daggs*, 108 U. S., 143, the repeal of a law forfeiting the interest of a loan for usury was upheld, on the ground that the law repealed was a penal law embodying a

rule of public policy which was entirely extrinsic to the contract, and consequently did not enter into it in any way.

The same reasoning underlies the decision in *Campbell vs. Holt*, 115 U. S., 620, where it was held that a statute of limitations does not enter into the contract, and can be altered. The strong dissenting opinion by Justices Bradley and Harlan points out that this case goes to the very extreme of permissible changes.

In *City and Lake R. R. Co. vs. New Orleans*, 157 U. S., 219, an act was sustained which permitted a municipality to enforce by *mandamus* contracts made with it by corporations for public improvements. The decision went largely on the ground that it was consonant with public policy to give a new mode of enforcing a public duty.

In *League vs. Texas*, 184 U. S., 156, 158, a statute changing the method of collecting taxes due the State was held not to impair the obligation of contracts, on the ground that the relation between the State and the taxpayer is not a contractual relation at all.

In *Waggoner vs. Flack*, 188 U. S., 595, the Court sustained an act permitting the forfeiture of public lands for non-payment of interest on a note given for the purchase price. The court held that the State had not contracted to limit itself to any particular remedy for the default. While the opinion contains some *dicta* to the effect that the remedy may be changed, it is submitted that the real ground of the decision is the rule, laid down in *Dollar Savings Bank vs. U. S.*, 19 Wall., 227, 239, that a statute providing for a particular remedy between a State and its citizens does not constitute a contract that no other remedy shall be provided or used; and, therefore, as in *League vs. Texas, supra*, no contractual right was impaired.

The changes which have been sustained fall within one or the other of these classes:

1. Changes in the *form* of the remedy, which do not substantially affect the relations between the parties.

2. Changes in general rules of public policy which are extrinsic to the contract, and do not enter into it.

3. Changes in the remedy of the State, or one of its subdivisions, against its citizens, which do not impair any contract, because the relationship between the State and its citizens is not a contractual one.

In the case at bar, the change is a vital change in the relationship of the parties to the contract, and cannot, it is submitted, be sustained as a mere change in the form of the remedy.

(6) THE DEPRIVATION OF THE RIGHT TO BE HEARD AS TO THE CLAIMS OF CREDITORS, AND OF VESTED DEFENSES TO SUCH CLAIMS.

In permitting the indebtedness of the corporation to be fixed without making the stockholders parties, the statute deprives them of the opportunity of testing or questioning any claim against the corporation that may be presented, or having it determined whether it is a claim of such a nature as to make the stockholders liable for it.

There is another serious infringement on the rights of stockholders: the stockholders, who are liable directly to creditors for debts of the corporation, may have many defenses against claims, which, for one reason or another, may not be available to the corporation itself—for example, *ultra vires*, the statute of limitations, release to stockholders and many others that will readily come to mind. Such a defense, assuming it to be pleadable by the corporation, in any given case, the corporation may have waived, or may be estopped from asserting, without thereby binding the stockholders individually, yet by the new statute stockholders are made liable indiscriminately for all claims which may be allowed, in their absence, against the corporation, in the assignment or receivership proceedings.

The vested right of stockholders to contest the claims of creditors under the former statute is well recognized. The proceedings, as has already been pointed out, were in the nature of a suit in equity, to which all creditors and all stockholders were parties from the beginning. Any claim asserted by any creditor could be contested by any party to the suit, and particularly by any stockholder.

In *National German American Bank vs. St. Anthony, etc., Co.*, 61 Minn., 359, it was held that the proper practice in an action under Chapter 76 was to bring stockholders in as parties defendant at the start; but if plaintiff failed to do so, any other creditor might come in and file a complaint and have the stockholders brought in as parties defendant.

In *Pioneer Fuel Co. vs. St. Peter Street Improvement Company*, 64 Minn., 386, it was held that in an action under Chapter 76 the stockholders made defendants must plead to the complaint, but need not plead to the claim of each creditor, and said, regarding the claims of creditors, at page 388:

> "These petitions or proofs of claim are *sui generis;* and it is not necessary for the defendant stockholders, or any other party to the action, to answer or reply to them, but they stand denied by all parties, and must be proved on the trial, unless expressly admitted."

In *Oswald vs. Minneapolis Times Co.*, 65 Minn., 249, the claims of creditors were contested by a defendant stockholder.

In *Palmer vs. Bank of Zumbrota*, 72 Minn., 266, it was held that judgment should be rendered only in favor of those creditors who have proved their claim in the proceedings against stockholders.

In *Helm vs. Smith-Fee Co.*, 76 Minn., 328, 331, it was held that in an action under Chapter 76 each creditor's claim is deemed to be controverted and he must prove his claim.

See also,

Chesnut *vs.* Pennell, 92 Ill., 55.

In the case at bar, no notice was given of any hearing on claims, excepting by publishing a notice directed to creditors only, and it does not appear that any stockholder was heard regarding the claims of creditors. Most of the claims allowed by the court were for debts created more than six years before the assessment proceedings, and it may be that if the stockholders had been heard, they might have successfully pleaded the statute of limitations as a defense to the greater portion of this indebtedness.

(7) THE CHANGE FROM A LIABILITY OWING TO THE CREDITORS TO A LIABILITY OWING TO A RECEIVER.

It is well settled that the double liability of stockholders is a liability to the creditors, and not to the corporation. It follows, and it had repeatedly been held before the Statute of 1899, that the liability is not an asset of the corporation, and cannot be enforced by a receiver.

In re People's Live Stock Insurance Co., 56 Minn., 180, 185.
Palmer *vs.* Bank of Zumbrota, 65 Minn., 90, 98.
Minneapolis Baseball Co. *vs.* City Bank, 66 Minn,. 441, 445, 446.
Richardson *vs.* Merritt, 74 Minn., 354, 362.
Hale *vs.* Allinson, 188 U. S., 56, 67.

See also,

Converse *vs.* Aetna National Bank, 64 At., 341, 344.

This liability the new statute assumes to take from the creditors and to give to a receiver, not of the creditors, but of the corporation. In so doing, it impairs the rights of both creditors and stockholders.

To sum up the vital changes which the new statute assumes to make in the contract: It changes the entire nature of the liability from a liability to all the creditors generally, enforceable only in an action in equity at the corporate domicile with all stockholders and creditors as parties, to a liability which can, as to non-resident stockholders, be fixed by proceedings to which they are not parties, and of which they have received no notice, and permits the liability so fixed to be enforced by an action against any one stockholder by a receiver in a court of law at the domicile of the stockholder. It changes the liability of stockholders from a liability to creditors for the deficiency in corporate assets for the payment of debts, and substitutes a liability to a receiver of the corporation for all claims against the corporation, whether

debts or otherwise, for all the costs and expenses of the receivership, and for the commissions of the receiver; and not content with this, it adds an additional liability for an estimated probable indebtedness, for estimated probable insolvencies of other stockholders, and for estimated probable expenses of collecting the assessment against solvent stockholders—in short, it leaves the entire question of the amount to be paid by stockholders not subject, as heretofore, to a fixed legal criterion, but subject only to the arbitrary discretion of the court. It deprives stockholders of the right heretofore vested in them to contest the claims of crediors, and to require their judicial establishment as against stockholders, and deprives them of vested defenses to such claims, and subjects them to all claims which may be made against the corporation, whether incurred during the life of the corporation or after its practical dissolution, and whether or not they would, under the former statute, have been claims for which the stockholders were liable.

It is believed that changes so radical as these have never been sustained by any court.

II.

The Act of 1899 deprives stockholders of property without due process of law, by authorizing a conclusive judgment against non-resident stockholders who have not been served with process.

The only notice to stockholders provided for by the act is that on the petition being filed the Court "shall direct such notice of such hearing to be given by the party presenting said petition, *by publication or otherwise,* as the Court in its discretion may deem proper" (Section 2). The act provides, "Said order and the assessment thereby levied shall be *conclusive* upon and against all parties liable upon or on account of any stock or shares of said corporation, *whether*

appearing or represented at said hearing or having notice thereof or not, as to all matters relating to the amount of and the propriety of and necessity for the said assessment" (Section 5). Section 6 provides that it shall be the duty of the assignee or receiver to bring an action against every stockholder for the amount so assessed against him.

In the case at bar, it is conceded that the defendants were not parties to the assessment proceedings, and had no knowledge in fact of them (Record, p. 41). They contend that the statute, permitting a conclusive assessment against them without service of process upon them, deprives them of their property without due process of law.

That due process of law requires personal service of process, or a voluntary appearance, is so well settled as not to admit of discussion.

> Mason *vs.* Eldred, 6 Wall., 231, 239.
> Pennoyer *vs.* Neff, 95 U. S., 714, 733, 734.
> Haddock *vs.* Haddock, 201 U. S., 562, 567.
> Clark *vs.* Wells, 203 U. S., 164, 170.

The plaintiff's claim is that the stockholders were "in law represented by said Minnesota Thresher Manufacturing Company in said proceedings."

Starting with the settled proposition that personal service is necessary to constitute due process of law, unless it has been waived, the plaintiff's contention can be supported only by finding that the defendants, or their testators, have waived personal service, and have consented to be represented by the corporation in assessment proceedings. Such waiver and consent implies some voluntary act on the part of the stockholder. It appears that all that the defendants or their testators ever had to do with the corporation was to exchange their preferred stock in the Northwestern Manufacturing and Car Company for common stock in the Minnesota Thresher Manufacturing Company, in the year 1885. If there has been any waiver or consent, it must, therefore, be found in connection with the act of subscribing to the shares of stock.

Whether the subscription to shares in a Minnesota corporation involved an authorization to the corporation to rep-

resent the stockholder in assessment proceedings, and a waiver of notice of such proceedings, obviously depends on the law of Minnesota at the time of the subscription. Both the Minnesota Supreme Court and this court have held that stockholders not parties to the proceedings were not bound by them.

> Commercial Bank of St. Paul *vs.* Azotine Mfg. Co., 66 Minn., 413, 416.
> Hale *vs.* Allinson, 188 U. S., 56, 80, 81.

The holding, that stockholders not parties are for that reason not bound, necessarily involves a holding that they have not waived their right to notice of the proceeding against them. If the non-resident stockholders in the cases cited were not represented by the corporation, on what principle can it be argued that stockholders in other corporations are so represented?

It will hardly be contended seriously that the act of 1899, to which the stockholders did not assent, operated as a waiver of their right to notice. If they ever waived that right they did so in 1885, when they took stock, and that they did not do so is established by the cases cited.

That holding is sound on principle, and conforms to the rule prevailing generally with regard to the relation between a corporation and its shareholders. The stockholder, by becoming such, impliedly authorizes the corporation to represent his interests in the conduct of the corporate affairs.

> Holland *vs.* Duluth Iron Mining & Development Co., 65 Minn., 324, 331.

Obviously, he does not authorize the corporation to represent him as to matters that are not part of the corporate business. The double liability of stockholders is such a matter. As this court clearly and succinctly expressed it, after reviewing the Minnesota decisions:

> "That was a contract in behalf of the creditor, *with which the corporation had nothing to do.*"
>
> Hale *vs.* Allinson, 188 U. S., 56, 67.

How, then, could the corporation represent the stockholders with regard to it? Clearly, as to liabilities such as this, to which the corporation is not a party and which are not assets of the corporation, it has no implied authority to represent the stockholders, any more than it would have implied authority to represent the endorsers on its corporate notes.

Willius *vs.* Mann, 91 Minn., 494.
Andrews *vs.* National Foundry & Pipe Works, 76 Fed., 155, 172.
Converse *vs.* Aetna National Bank, 64 At., 341, 344, 345.
Converse *vs.* Stewart, 105 N. Y., App. Div., 478.
Stephens *vs.* Fox, 83 N. Y., 313, 317.
Great Western Telegraph Co. *vs.* Barker, 56 Ill. App., 402, affirmed, 166 Ill., 150.

The Supreme Court of Minnesota, in holding, contrary to the earlier decisions of the same court, cited above, that the corporation represents the stockholders in the assessment proceedings, relies upon a number of decisions, none of which, it is submitted, support the conclusion.

Straw & Ellsworth Mfg. Co. *vs.* Kilbourne Boot & Shoe Co., 80 Minn., 125.

The cases relied on by that court fall naturally into the following classes:

1. The stock subscription cases.

Sanger *vs.* Upton, 91 U. S., 56.
Hawkins *vs.* Glenn, 131 U. S., 319.
Great Western Telegraph Co. *vs.* Purdy, 162 U. S., 329.
Hamilton *vs.* Glenn, 85 Va., 901.
Glenn *vs.* Williams, 60 Md., 93.

These cases hold that in winding up proceedings, a court of equity may make, or direct the receiver to make, a call or assessment, for the amount remaining due on stock subscriptions, or a portion thereof, without notice to stockhold-

ers. These cases go on the ground that the stockholder has agreed to pay the money to the corporation whenever the directors call for it; the directors could make such call at any time without notice to the stockholder; and when the corporation becomes insolvent, the court takes the place of the directors, and may do what the directors could have done with reference to this corporate asset, viz., make a call or demand for it without notice to the stockholder.

See the reasons for the rule, stated in

Hawkins *vs.* Glenn, 131 U. S., 319, 329.
Great Western Telegraph Co. *vs.* Purdy, 162 U. S., 329, 336.
Great Western Telegraph Co. *vs.* Gray, 122 Ill., 630, 640.

2. The premium note cases.

Langworthy *vs.* Garding, 74 Minn., 325, and other cases.

These decisions rest on exactly the same footing as the stock subscription cases. The makers of the notes had executed their obligations to the corporation, agreeing that the corporation might demand payment at any time. When the corporation became insolvent, the court could exercise the corporate function of making the demand or call. It was not stipulated that the corporation should hear the makers before making the call, and the court, in collecting this corporate asset, simply took the place of the corporation.

3. Cases where the statute imposing the liability also provided that an assessment upon it might be made in winding up proceedings without notice.

Howarth *vs.* Lombard, 175 Mass., 570.
Sheafe *vs.* Larimer, 79 Fed., 921.
Howarth *vs.* Ellwanger, 86 Fed., 54.
Howarth *vs.* Angle, 39 App. Div., 151; 162 N. Y., 179.
Hancock Nat. Bank *vs.* Farnum, 176 U. S., 640.

In each of these cases, the statute in force at the time of the stock subscription provided for an assessment in winding up proceedings, without notice to stockholders. By subscribing to stock, the stockholders contracted with reference to the statute, and assented to its provisions. They thereby waived their right to notice, and consented that their liability should be administered as a corporate asset.

4. The National bank cases.

Kennedy *vs.* Gibson, 8 Wall., 498.

This case, and the cases following it, simply construe the provisions of the National bank act, in the light of the policy of Congress relating to National banks, and hold that the statute permits an assessment by the Comptroller of the Currency without notice to the stockholders. To these provisions of the statute all persons taking stock in National banks are deemed to assent; and those cases stand on the same footing as the third class of cases cited.

In all of these cases, there are present two salient features which are absent in the case at bar:

a. The liability is either in its nature a corporate asset, or the stockholders have agreed that it be administered as a corporate asset.

b. The stockholders have assented that a call or assessment be made without notice to them.

In the present case, the stockholders have never consented to anything but the liability as it existed when they took their stock; and this, as has been abundantly shown, was a liability to the creditors, and never in any sense a corporate asset, and was enforceable only in an equity action to which all stockholders were parties, and did not bind any stockholder who was not a party.

Realizing the importance of this distinction between the stockholders' liability to creditors on the one hand, and corporate assets like unpaid stock subscriptions and premium

notes on the other, the Minnesota court, at this late day, endeavors to do away with the distinction altogether (80 Minn., pp. 134, 135), and cites as authority for its position a *dictum* in *Hanson vs. Davison*, 73 Minn., 454, 462.

In relying on this *dictum*, the court apparently overlooked the fact, pointed out by this court in *Hale vs. Allinson*, 188 U. S., 56, 64, that the *dictum* was inconsistent with the actual decision in *Minneapolis Baseball Co. vs. City Bank*, 66 Minn., 441, and cannot be regarded as overruling the prior cases. Those cases hold squarely that the double liability is in no sense a corporate asset, and is not governed by the principles applicable to stock subscriptions, premium notes, and other assets of the corporation.

In re People's Live Stock Insurance Co., 56 Minn., 180, 185.
Palmer *vs.* Bank of Zumbrota, 65 Minn., 90, 98.
Minneapolis Baseball Co. *vs.* City Bank, 66 Minn., 441, 445, 446.
Richardson *vs.* Merritt, 74 Minn., 354, 362.
Hale *vs.* Allinson, 188 U. S., 56, 67.

The authorities cited by the Minnesota court do not support its view, that the corporation was authorized to represent the stockholders in the assessment proceedings.

It should be borne in mind that at the time of those proceedings, when the corporation is claimed to have represented the stockholders, this corporation had, for all practical purposes, ceased to exist. There had been no meeting of stockholders of the company since June 22, 1892, and the last meeting of the directors had been held June 29, 1901 (Record, p. 52). Since December 14, 1900, the company had been in the custody of a Federal Court receiver, appointed in a suit to foreclose a mortgage covering all its property and franchises. On July 12, 1901, a sale of all the company's property and franchises under foreclosure had been confirmed by the court (pp. 72, 73). On August 15, 1901, when the sequestration action was begun, the company had not only ceased to do any business, but had been stripped of all its property and franchises. It was, therefore, no longer capable of representing its stockholders or any one else.

It is the recognized rule that a defunct corporation like this can no longer represent its stockholders, even as to the corporate affairs and assets.

Danforth *vs.* National Chemical Co., 68 Minn., 308.
Schrader *vs.* Manufacturers' National Bank, 133 U. S., 67, 76, 77.
Covell *vs.* Fowler, 144 Fed., 535, 538, 539.

Nor did the corporation in fact make any pretense of representing the stockholders. It did not appear in the assessment proceedings. The summons and complaint in the sequestration action were served on Mr. Buffington and handed by him to Mr. McBeath, as above described, and on the following day Mr. McBeath appeared in court, and in the name of the company consented, so far as appears, to the appointment of a receiver. In none of the subsequent proceedings is any appearance by the company noted. The order of assessment was made after hearing counsel for the receiver on the one hand, and counsel for certain stockholders, but there was no appearance for the corporation which is now claimed to have represented the stockholders (p. 66).

No appearance by the corporation appears to have been contemplated by the statute of 1899. Section 2 provides for "such notice * * * by publication or otherwise, as the Court, in its discretion, may deem proper." Section 3 directs the court at the hearing to consider such proofs as may be offered "by the assignee or receiver, or by any creditor or officer or stockholder of said corporation who may appear in person or by attorney." No provision is made for hearing the corporation. The statute recognizes that by the time of the hearing the corporation is likely to be defunct, and that the contesting parties will be the receiver or the creditors on the one hand, and the officers or stockholders on the other.

It is submitted that the framers of the statute never contemplated any appearance by the corporation as representing the stockholders. What they supposed was, that the notice provided for in Section 2 would be sufficient to bind the stockholders. The Minnesota Supreme Court, doubtless realizing that notice "by publication or otherwise" does not

constitute due process of law, resorted to the theory of representation by the corporation, in order to sustain the statute,—a theory which, it is submitted, is not in accord with the law or the fact.

To sum up: Stockholders in corporations are, no less than all other citizens, protected against deprivation of their property without due process of law, which, in proceedings against them, requires personal service of process. Like all other defendants, they may waive that requirement, and consent to an assessment without notice; but in the absence of such waiver, they cannot be bound by an assessment without notice, however convenient such a mode of procedure may appear to be. In the case at bar, it is unquestioned that before the statute of 1899, the defendants were entitled to a hearing, and that statute could not deprive them of that right without their consent. As they never assented to its provisions, it follows that as to them it is a nullity. Nor could they be represented by the corporation with regard to a liability with which the corportaion had nothing to do, and as to which they never agreed that it should represent them; especially where the corporation had practically ceased to exist, and did not pretend to represent them, and the statute did not contemplate that it should.

III.

The Minnesota court was without jurisdiction to make the order of assessment.

These actions were brought upon the assessment order, as on a judicial determination binding upon the defendants. The question arises, whether the District Court of Washington County, Minnesota, had jurisdiction to make that determination. That is always a proper subject of inquiry, for if that court acted without jurisdiction, its determination is a nullity, and no recovery can be based on it.

Williamson *vs.* Berry, 8 How., 495, 540.
Thompson *vs.* Whitman, 18 Wall., 457, 468.
Old Wayne Life Assn. *vs.* McDonough, 204 U. S., 8, 15-17.

These defendants contend that even assuming the statute of 1899 to be constitutionally valid, the Minnesota court failed to comply with the requirements of the statute, and was without jurisdiction of the subject matter, and without jurisdiction of the persons of the defendants.

3. THE DISTRICT COURT OF WASHINGTON COUNTY, MINNESOTA, HAD NO JURISDICTION OF THE SUBJECT MATTER, BECAUSE NO STATE OF FACTS EXISTED UNDER WHICH IT WAS AUTHORIZED TO APPOINT A RECEIVER AND MAKE AN ASSESSMENT.

The statute of 1899 authorizes the District Court to proceed in the manner therein prescribed, in certain cases. Unless one of those cases or states of fact existed, the court had no jurisdiction to proceed.

Thatcher *vs.* Powell, 6 Wheat., 119, 127.
East Tennessee, Va. & Ga. R. R. Co. *vs.* Southern Telegraph Co., 112 U. S., 306, 310.
Griffith *vs.* Frazier, 8 Cranch, 9, 23.
Hatch *vs.* Ferguson, 68 Fed., 43, 45.
Murray *vs.* American Surety Co., 70 Fed., 341, 346.

The cases in which alone the court may proceed under the statute, are thus defined in Section 1: "Whenever any corporation * * * has heretofore made or shall hereafter make an assignment for the benefit of its creditors under the insolvency laws of this State; or whenever a receiver for any such corporation has heretofore been or shall hereafter be appointed by any District Court of this State, whether under or pursuant to any of the provisions of Chapter seventy-six (76) of the General Statutes of eighteen hundred and ninety-four (1894) of Minnesota, and the acts amendatory thereof, or under or pursuant to any other statute of this State, or under the general equity powers and practice of such

court; the District Court appointing such receiver, or having jurisdiction of the matter of said assignment, may proceed as in this act provided."

The sequestration action was brought, and the appointment of the receiver was applied for, under the supposed authority of Chapter 76 of the General Statutes (p. 58). The question then is, whether a receiver was lawfully appointed under the provisions of that chapter? Those provisions are, briefly, as follows: On the return of an execution unsatisfied, the District Court, in the proper county "may sequestrate *the stock, property, things in action and effects of such corporation,* and appoint a receiver of the same" (Section 5897). Any creditor desiring to enforce the liabilities of directors, officers or stockholders may file a complaint (Sec. 5905). "The Court shall proceed thereon, as in other cases, and *when necessary* shall cause an account to be taken *of the property and debts due to and from such corporation,* and shall appoint one or more receivers." (Section 5906). If it appears that the corporation is insolvent and has *no property,* "the Court may proceed, *without appointing any receiver,* to ascertain the respective liabilities of such directors and stockholders, and enforce the same by its judgment, as in other cases." (Section 5907).

The meaning of these provisions is plain. When there is property of the corporation to be administered, the court may sequestrate it, and appoint a receiver of such property, as an incident to its administration. If, in such case, the creditors file a complaint to enforce stockholders' liabilities, that complaint can be entertained, and the corporate property administered, in one omnibus equity proceeding, to which all creditors and all stockholders are parties. But if there is no corporate property, no receiver is to be appointed; for, as has been seen, the stockholders' liability is not a corporate asset. The Minnesota Supreme Court has accordingly decided that where there are no corporate assets, it is not a case for the appointment of a receiver.

International Trust Co. *vs.* American Loan & Trust Co., 62 Minn., 501.

That was exactly the case here. The corporation had been stripped of all its property and franchises. The complaint in the sequestration action alleged that the corporation had no property whatever (p. 49); and thereby showed on its face that there was no case for the appointment of a receiver.

Inasmuch, then, as the case was not one in which a receiver could be appointed, the court had no jurisdiction to take the proceeding which the statute of 1899 authorized only in a case where a receiver was appointed under authority of law. It follows that the assessment order was void for want of jurisdiction.

B. THE DISTRICT COURT OF WASHINGTON COUNTY, MINNESOTA, HAD NO JURISDICTION OF THE PERSONS OF THE DEFENDANTS, BECAUSE IT FAILED TO GIVE THEM THE NOTICE REQUIRED BY THE STATUTE.

The statute of 1899 requires the giving of "such notice of such hearing to be given by publication or otherwise, as the Court in its discretion may deem proper." Assuming for the moment, that compliance with this requirement would constitute due process of law, the burden of proof was upon plaintiff to show such compliance; in default of which he has failed to show jurisdiction over the persons of the defendants, and the assessment order is a nullity.

Galpin *vs.* Page, 18 Wall., 350.
Windsor *vs.* McVeigh, 93 U. S., 274, 283, 284.
Old Wayne Life Ass'n *vs.* McDonough, 204 U. S., 8, 18.

It was, therefore, incumbent upon the plaintiff to show what direction, if any, the District Court made for the giving of notice of the hearing to the persons who were entitled to be heard,—viz., the creditors, officers and stockholders (Section 3)—and that those directions had been complied with.

No such showing was made. On the contrary, the record shows affirmatively that the requirements of the statute were not complied with. The only reference to any attempt at giving notice to any stockholder is the recital in the assessment order, that some order had been made by the Court on April

16, 1902, the terms of which are not stated, and "that copies of said order dated April 16, 1902, were duly published, mailed and served in the manner therein prescribed, and that due notice of said hearing was duly given by said receiver to the defendant and to each stockholder of record of the defendant, as directed by said order" (p. 66).

What notice this order directed to be given, nor whether in fact those directions were carried out, does not appear. Under the authorities cited above, it was incumbent on the plaintiff to prove these facts, it being admitted that jurisdiction was not acquired by personal service.

It does appear, however, that no notice whatever was directed or given to stockholders until *after* the hearing at which the claims of creditors had been heard and allowed. By order of September 3, 1901 (p. 56), a notice was published *directed to creditors only*, and not to stockholders (p. 57), requiring them to prove their claims, pursuant to the provisions of Section 5911 of Chapter 76 of the General Laws of 1894. It was not until *after the hearing on and allowance of claims* that the receiver filed his petition on April 16, 1902, on which an order was then made by the Court directing notice to stockholders of an application for an order assessing them to pay those claims. But when that notice—whatever it was—was given, the claims had already been established, and all that remained to be determined was the amount of the assessment required to pay them.

This is not the notice contemplated by the statute. As has been shown above, stockholders were, under the former law, entitled to be heard as to the claims of creditors, before they were allowed.

National German-American Bank *vs.* St. Anthony, &c., Co., 61 Minn., 359.
Pioneer Fuel Co. *vs.* St. Peter Street Improvement Co., 64 Minn., 386, 388.
Oswald *vs.* Minneapolis Times Co., 65 Minn., 249.
Palmer *vs.* Bank of Zumbrota, 72 Minn., 266.
Helen *vs.* Smith Fee Co., 76 Minn., 328, 331.

This rule the new statute assumed to change, in so far as it substituted notice by publication or otherwise for the per-

sonal service formerly required. It did not change the rule that whatever notice was given must be given *before the hearing on claims.* It requires "*notice of such hearing*" (Section 2). Of what hearing? Of the hearing at which the Court is required to hear the receiver, and any creditor, officer *or stockholder,* as to *the indebtedness,* the expenses, the assets, the liabilities of stockholders and the necessity for and amount of an assessment.

Straw & Ellsworth Mfg. Co. *vs.* Kilbourne Boot & Shoe Co., 80 Minn., 125, 138.
London, &c., Mortgage Co. *vs.* St. Paul, &c., Co., 84 Minn., 144, 146.

In the case last cited, a proceeding under the Statute of 1899, the hearing on claims of creditors and the hearing on the question of assessing stockholders, were held together, and stockholders were heard on all questions arising, and were allowed to control the claims of creditors.

How vain and ineffectual is such a notice as was given in the case at bar,—after the amount of the indebtedness had been fixed, when there remained nothing to contest. This proceeding, it is submitted, was had in disregard of the plain requirements of the statute, and the order was without jurisdiction and void.

Thus far, it has been shown, that no sufficient notice was given to stockholders. Apart from and in addition to this objection, stands the objection that *no notice whatever was given to these defendants.* This is an admitted fact (pp. 41, 101). The only notices which appear ever to have been sent with reference to their stock were notices, given *after the making of the assessment order* (p. 67), and were mailed addressed to the defendants' testators, both of whom were dead (p. 101). Such a notice, whenever sent, could not operate as notice to these defendants.

However liberal the provisions of the Statute of 1899 on the subject of notice, it did require *some* notice to the defendants, and *no* notice was given them. Consequently, the Court never acquired jurisdiction over them to make an assessment.

To sum up the objections to the jurisdiction of the Court:

1. In the absence of corporate property of which a receiver could be appointed, the case was not one in which a receiver could be appointed, and the Court had no authority to proceed under the Statute of 1899.

2. The record is bare of any proof of notice to stockholders.

3. If any notice was given to stockholders, it was given after, and not before, the hearing on the claims of creditors.

4. No notice whatever was given to these defendants.

It follows that the District Court of Washington County, Minnesota, in making the assessment order, acted without jurisdiction of the subject matter, or of the persons of the defendants, and that the assessment order is a nullity, and cannot be the basis of a recovery against the defendants.

IV.

The plaintiff as receiver has no such title as can give him the right to maintain this action.

It is now so decisively settled by the decisions of this Court that a receiver cannot, by virtue of the authority conferred upon him by his appointment, maintain an action in the federal courts in any jurisdiction other than that in which he was appointed, that argument or discussion on the point is needless.

Booth *vs.* Clark, 17 How., 322.
Hale *vs.* Allinson, 188 U. S., 56.
Great Western Mining Co. *vs.* Harris, 198 U. S., 561.

Only two exceptions to this rule are recognized:

1. Where the receiver has title to the cause of action. This is not a real exception, but only an apparent one, because in

such a case he sues, not as receiver at all, but as the owner of the property or the chose in action which is the subject matter of the litigation.

Relfe *vs.* Rundle, 103 U. S., 222, 225.
Great Western Mining Co. *vs.* Harris, 198 U. S., 561, 576, 577.

2. Where the stockholders have contracted with reference to an existing statute authorizing an assessment to be sued upon by a receiver whether having title or not, and have thereby agreed to respond to a suit brought by a receiver. In such a case, they are held to their contract, and cannot question the receiver's right to sue.

Relfe *vs.* Rundle, 103 U. S., 222, 226.
Howarth *vs.* Lombard, 175 Mass., 570, 574, 576.
Howarth *vs.* Angle, 162 N. Y., 179, 187.
Howarth *vs.* Ellwanger, 86 Fed., 54.
Fish *vs.* Smith, 73 Conn., 377, 381.
King *vs.* Cochran, 76 Vt., 141, 150.

Neither of these facts exists in the case at bar.

1. The receiver has no title. The liability was a liability of the stockholders to the creditors, not to the corporation. The receiver was the receiver, not of the creditors, but of the corporation. He could take title only to corporate assets. Concededly he acquired no rights by assignment from the creditors (p. 72).

If the Statute of 1899 assumed to give the receiver title, it could not effectuate its object, because the legislature had no power to take the rights of the creditors and transfer them to a receiver.

See Hilliker *vs.* Hale, 117 Fed., 220, 224.

But the statute did not assume to do any such thing. It provides that whenever a receiver is appointed under existing provisions of law (Section 1), the Court may make an assessment (Sections 2 and 3), and may direct the receiver to collect the assessment (Section 4), whereupon he may main-

tain actions thereon in any jurisdiction (Section 6). This does not give the receiver title. The receiver here was appointed under the provisions of Chapter 76 of the General Statutes of 1894, the same statute under which the receiver in Hale *vs.* Allinson, *supra,* was appointed. That is to say, he was a chancery receiver,—the arm of the Court. The Statute of 1899 did not change his character or his title. It made this change: in *Hale* vs. *Allinson,* the Minnesota Court had, without express statutory authority, directed its receiver to bring suit in foreign jurisdictions. The Statute of 1899 conferred upon the Court express authority to make such direction.

The order of the Court directing the receiver to bring such suits, whether it was expressly authorized by statute or not, still had no other or greater force than that of being an authorization given by the Court to its own officer. His rights depended, not on any title, but solely on the order of the Court. This fact was not altered by the statute expressly authorizing the Court to make such order.

The Minnesota Court could not make its order operative or send its representative beyond the territorial limits of the State, and the legislature of the State could not give it that power. This is the principle settled by the decisions of this Court, cited above, and they are controlling in the case at bar.

2. The defendants never agreed to respond to a receiver appointed by the Court.

The theory of the cases upon which plaintiff relies is thus concisely stated by Mr. Justice Baldwin, in

Converse *vs.* Aetna Nat. Bank, 64 At., 341, 345:

"For the purposes of this appeal, we assume (but do not decide) that the plaintiff is a proper representative of the creditors of the Minnesota Thresher Manufacturing Company; that he can maintain this action, as a statutory successor to their contractual rights against the defendant, *upon its implied promise to satisfy those rights on the demand of such a successor to them;* and that these, under the terms of the defendant's contract, could properly be worked out and defined by an order of assessment made by a Minne-

sota Court, on a creditor's bill, filed after the corporation had become wholly destitute of assets."

That the defendants never entered into any such agreement, express or implied, has, it is believed, been so plainly demonstrated as not to require further argument.

It is submitted that the receiver had no such rights, whether by ownership or by contract, as to give him a standing to maintain these actions in a federal Court sitting in a State foreign to that of his appointment.

V.

The Minnesota Thresher Manufacturing Company was a corporation organized for the purpose of carrying on a manufacturing business and its stockholders are exempt from liability under the provisions of Section 3 of Article X of the Constitution of the State of Minnesota.

This question was so carefully considered by this Court in

> First National Bank *vs.* Converse, 200 U. S., 425,

that it will not be reargued here. The Court did not decide this question, because of the existence of a dilemma, which is thus stated in the opinion, at page 440:

"Indeed, the case arising on the record presents an obvious dilemma, which is this: If the construction of the articles of association given by the Supreme Court of the State of Minnesota, by which alone the double liability can be enforced, is accepted, then there was no liability because of *ultra vires*. If, on the other hand, we were to disregard the construction given by the Supreme Court of Minnesota to the

articles of association *we should be constrained to the conclusion that those articles but endowed the incorporators of the Thresher Company with the power to carry on a manufacturing business, and as a mere incident to acquire for the purposes of such business the property of the car company; and it would follow that there was no double liability, by force of the exception created in the constitution of Minnesota.*"

The opinion thus indicated sets forth, it is submitted, the correct construction of the articles of association. The case cited arose on demurrer. The additional facts brought out in the case at bar but strengthen the view there taken and emphasize its wisdom.

The Minnesota Thresher Manufacturing Company was organized for the sole purpose of preserving from ruin, and continuing the manufacturing business of the Northwestern Manufacturing and Car Company (pp. 29-31). The acquisition of the stock and assets of that company was merely a necessary preliminary and an incident to the continuance of the business. The new company was expressly organized pursuant to a statute relating to manufacturing corporations (p. 35). The creditors and preferred stockholders of the old company, in exchanging their claims and their stock for stock in the new company, did so in reliance on the assurance that no individual liability would be attached to a subscription, and that the stock would be full paid and non-assessable (p. 34). The certificates of stock themselves contained the statement that they were "full paid and non-assessable" (pp. 40, 72). The certificate of incorporation on its face shows, as the opinion of this Court in the case cited indicates, that the acquisition of the property of the car company was to be a mere incident to the continuance of its manufacturing business (p. 35).

Under these circumstances, were not the stockholders justified in relying on the protection given to stockholders in manufacturing corporations, by the express provisions of the Constitution of the State of Minnesota? It is clear that they never intended to assume any liability to creditors. In the absence of any judicial construction of the constitutional provision, it is submitted that the language of that provision and

of the articles of association, as well as all that was done in connection with the organization of the company, warranted the stockholders in believing that they might become stockholders in this manufacturing corporation without subjecting themselves to any additional individual liability for its debts. It is evident that they did so believe in good faith, and in reliance on that belief they made their contract.

Then, four years after the contract was made, the Supreme Court of Minnesota held that the contract did not mean what everybody had supposed it to mean; that the company was not a manufacturing corporation at all, but, as this Court has expressed it (*First National Bank vs. Converse*, 200 U. S., 425, 438), "was organized to embark in the purely speculative business of buying and selling the stock and assets of an existing and insolvent corporation, with power, but without the obligation, to engage as an independent enterprise in a manufacturing business!"

> State *vs.* Minnesota Thresher Manufacturing Co., 40 Minn., 213.

That was the first time this doctrine was laid down by the courts of Minnesota. The question not decided by this Court in *First National Bank* vs. *Converse, supra*, is, whether this Court is bound by the construction adopted by these Minnesota decisions, handed down long after the contract in suit was made.

The answer to that question is found in the repeated decisions of this Court holding that the law does not allow contracts to be changed by subsequent judicial decisions, any more than by subsequent legislation; and that where, at the time of making a contract, there has been no judicial construction of it, this Court, while leaning to an agreement with state decisions subsequently construing it, is not bound by them, but will determine for itself what the contract was.

> Burgess vs. Seligman, 107 U. S., 20, 33, 34.
>
> Brunswick Terminal Co. *vs.* National Bank, 192 U. S., 386, 396.
>
> Great Southern Hotel Co. *vs.* Jones, 193 U. S., 532, 542-548, and cases cited.

Since, therefore, this Court has already expressed its opinion that a fair construction of the articles of association in the light of the constitutional provision requires a holding that the Minnesota Thresher Manufacturing Company was a corporation organized for the purpose of carrying on a manufacturing business, and since this Court is not bound by the contrary holding of the Minnesota courts, made after the defendants took their stock, it necessarily follows that the defendants are exempt from liability to creditors of the company, by virtue of the exception contained in the Constitution of Minnesota; and that they could not be charged with any such liability, either by the state court in Minnesota, or by the federal court in New York.

VI.

The actions were barred by limitation, because not brought within two years after the defendants ceased to be stockholders in the Minnesota Thresher Manufacturing Company, within the meaning of Section 55 of the Stock Corporation Law of the State of New York.

Several different statutes of limitations were relied on at the trial as applicable to these actions (pp. 116, 117); but the provision just cited so directly covers the case that the others will not be discussed.

Section 55 of the Stock Corporation Law of New York, being Chapter 688 of the Laws of 1892, provides as follows (italics are ours):

"LIMITATION OF STOCKHOLDERS' LIABILITY.—No action shall be brought against a stockholder for any debt of the corporation until judgment therefor has been recovered against the corporation, and an execution thereon has been returned unsatisfied in whole or in part, and the amount due

on such execution shall be the amount recoverable, with costs against the stockholder. No stockholder shall be personally liable for any debt of the corporation not payable within two years from the time it is contracted, nor unless an action for its collection shall be brought against the corporation within two years after the debt becomes due; and *no action shall be brought against a stockholder after he shall have ceased to be a stockholder, for any debt of the corporation, unless brought within two years from the time he shall have ceased to be a stockholder.*"

The provision cited is a statute of limitations relating to the liability of stockholders in all stock corporations, and is applicable not only to an action against a single stockholder on a single debt, but also to liabilities of all the stockholders to contribute ratably to a deficiency.

Adams *vs.* Wallace, 82 App. Div., 117.
Adams *vs.* Slingerland, 89 App. Div., 312.
Sanford *vs.* Rhoads, 113 App. Div., 782.

The limitation is applicable to actions against stockholders in all corporations, foreign as well as domestic.

General Corporation Law of New York (Laws of 1892, Chapter 687), Section 2; Section 3, Subdivision 5; Section 33.

Platt *vs.* Wilmot, 193 U. S., 602.
Hobbs *vs.* National Bank of Commerce, 96 Fed., 396.

When did the defendants cease to be stockholders within the meaning of this statute? This is a question of local law, upon which the decisions of the state courts are controlling.

Great Western Telegraph Co. vs. Purdy, 162 U. S., 329, 339.

The question has been decisively settled in

Hollingshead vs. Woodward, 107 N. Y., 96.

In that case the court construed the very words of the statute, as used in an earlier statute relating to manufactur-

ing corporations. The court held that when a corporation ceased to do business, and went into the hands of a receiver in sequestration proceedings, its existence was practically terminated, and its stockholders ceased to be such within the meaning of the statute. This language, so construed, of course retained the same meaning when it was re-enacted as a limitation applicable to liabilities of stockholders in all stock corporations.

The Minnesota Thresher Manufacturing Company had been in the hands of a receiver in foreclosure since December 14, 1900. All its property and franchises had been sold May 25, 1901 (pp. 72, 73); and on August 15, 1901, the order was made sequestrating the property of the corporation and appointing a receiver (pp. 53-55). These actions were not commenced until January 28 and 29, 1904 (pp. 73, 122).

These actions were not brought within two years after the defendants ceased to be stockholders in the Minnesota Thresher Manufacturing Company, and they are consequently barred by limitation.

It is respectfully urged that the judgments should be reversed, and the causes remanded, with directions to render judgment in favor of the defendants.

Respectfully submitted,
LAURENCE ARNOLD TANZER,
Of Counsel for Plaintiffs in Error.

FILE COPY.

In the Supreme Court of the United States,

OCTOBER TERM, 1906.

Numbers 278, 279.

Supreme Court,
FILED.
APR 12 1907
JAMES H. McKENN

MEYER S. BERNHEIMER and LORIN S. BERNHEIMER, Surviving Executors of the Last Will and Testament of Simon Bernheimer, deceased,

Plaintiffs in Error,

vs.

THEODORE R. CONVERSE, Receiver of the Minnesota Thresher Manufacturing Company,

Defendant in Error.

MAX DREY, CHARLES D. BERNHEIMER and MEYER A. BERNHEIMER, Executors of the Last Will and Testament of Isaac Bernheimer, deceased,

Plaintiffs in Error,

vs.

THEODORE R. CONVERSE, Receiver of the Minnesota Thresher Manufacturing Company,

Defendant in Error.

In Error to the Circuit Court of the United States for the Southern District of New York.

REPLY BRIEF FOR PLAINTIFFS IN ERROR.

LAURENCE ARNOLD TANZER,
Of Counsel for Plaintiffs in Error.

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In the Supreme Court of the United States,

OCTOBER TERM, 1906.

MAYER S. BERNHEIMER and LORIN S. BERNHEIMER, surviving executors of the Last Will and Testament of Simon Bernheimer, deceased,

Plaintiffs in Error,

vs.

THEODORE R. CONVERSE, Receiver of the Minnesota Thresher Manufacturing Company,

Defendant in Error.

No. 278.

MAX DREY, CHARLES D. BERNHEIMER and MEYER A. BERNHEIMER, executors of the Last Will and Testament of Isaac Bernheimer, deceased,

Plaintiffs in Error,

vs.

THEODORE R. CONVERSE, Receiver of the Minnesota Thresher Manufacturing Company,

Defendant in Error.

No. 279.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Reply Brief for Plaintiffs in Error.

The brief for defendant in error treats of the constitutional objections and the question of the receiver's right to maintain this action; and this reply will be confined to those points. The brief for the plaintiffs in error and the brief for the defendant in error will be cited as P. E. and D. E., respectively.

I.

The Impairment of the Obligation of the Contract.

There seems to be a radical difference in the views of the respective parties as to the nature and extent of the stockholders' double liability under the laws of Minnesota. The plaintiff's argument appears to be, that each stockholder has agreed to contribute to the corporate assets, in addition to his subscription, an amount equal to the amount of his stock, and that no change in the law affords him any ground for complaint which does not increase his liability beyond that amount. The defendants contend that the stockholder's agreement was not to contribute anything to the corporate assets, but to become liable directly to the creditors for such sum as a court of equity, after hearing all the creditors and all the stockholders, should fix as his proportionate share of the amount actually remaining due to creditors after the corporate assets have been exhausted; and that the obligation of his contract is impaired by any attempt to hold him liable for any different amount, or for an amount fixed in any other way.

The question then is, what was the stockholders' contract?

That the liability rests on contract is agreed by both sides (P. E., 29; D. E., 5).

Where are the terms of the contract to be found? First of all, in the constitutional provision creating the liability.

But the terms of that provision are indefinite. They are, that "Each stockholder * * * shall be liable to the amount of stock held or owned by him." This provides for just these two things: (1) there shall be a liability; (2) the limit of the liability shall be the amount of stock held or owned by the stockholder. Except for this limit of maximum amount, the liability is in no way limited or defined. The stockholders shall be liable to whom? For what obligations? Is the liability joint or several, absolute or proportionate? How is the amount of liability to be determined, and how enforced? In all these particulars, the liability requires to be defined; the general and indefinite language of the Constitution must be filled in.

The definition of the liability must be looked for in the decisions of the courts of Minnesota. The legislature never attempted to define it. The only statute on the subject is chapter 76 of the General Statutes (P. E., 6, 7). That does not in any way describe or define the liability, but only indicates in a general way the method to be followed for its enforcement. It provides that any creditor may file a complaint to charge the officers, directors or stockholders of any corporation "on account of any liability created by law" (Sec. 5905); that "the Court shall proceed thereon, as in other cases" (Sec. 5906), and "ascertain the respective liabilities of such directors and stockholders, and enforce the same by its judgment, as in other cases" (Sec. 5907); that if, after exhausting the assets of the corporation and the subscriptions of stockholders, the debts remain unsatisfied, "the Court shall proceed to ascertain the respective liabilities of the directors or other officers and of the stockholders, and to adjudge the amount payable by each, and enforce the judgment, as in other cases" (Sec. 5910).

This is no definition of any liability, but a mere skeleton of a method for enforcing all existing liabilities of stockholders, officers and directors. It is to the decisions of the courts of Minnesota, then, that we must look to ascertain the nature and extent of the double liability imposed by the Constitution of Minnesota. Those decisions have established the following propositions:

(1) The liability is one *to the creditors* of the corporation.

In Re People's Live Stock Insurance Co., 56 Minn., 180, 185: "But the constitutional or statutory liability is *directly to the creditors.* The corporation cannot enforce it. It is no part of its assets."

Minneapolis Baseball Co. v. *City Bank*, 66 Minn., 441, 446: "As to the liability of stockholders for the corporate debts, it is not, and never was, a corporate asset, for *it is due directly to creditors.*"

Hale v. *Allinson*, 188 U. S., 56, 67: "That was a contract in behalf of the creditor, with which the corporation had nothing to do."

(2) The liability exists for the payment of *debts.*

Willis v. *Mabon*, 48 Minn., 140, 148: "While no fixed form of words has been adopted to express the idea, yet provisions couched in more or less similar language have been frequently incorporated into constitutions and statutes, and have been uniformly understood and construed as providing for an individual liability of stockholders *for corporate debts* in addition to this risk of losing the amount of their stock. This is the meaning which has invariably attached to this provision of our Constitution."

McKusick v. *Seymour, Sabin & Co.*, 48 Minn., 158, 167: "That this section of the Constitution is self-executing, and creates a liability on the part of each stockholder *for corporate debts* in a sum equal to the amount of stock held or owned by him, has been determined in the case of *Willis* v. *St. Paul Sanitation Co.*, 48 Minn., 140."

Richardson v. *Merritt*, 74 Minn., 360, 362: "This superadded liability is not a corporate asset, and can only be enforced for the benefit of creditors, and then *only to the extent of paying the corporate debts remaining unpaid after the corporate assets have been exhausted.*"

(3) The liability extends only to the making up of any *deficiency* in payment of debts, *after the corporate assets are exhausted.*

See the last passage cited from *Richardson* v. *Merritt, supra.*

In re Martin's Estate, 56 Minn., 420, 422, 423: "This personal liability was evidently intended to provide for the contingency of a *deficiency of corporate assets,* which remain the primary fund for the payment of corporate debts."

(4) Each stockholder's liability is limited to his share of a *common fund* amounting to the sum *actually required to make up such deficiency.*

In re Martin's Estate, 56 Minn., 420, 422: "The object is to create *a common fund, limited in amount, for the benefit of all creditors.*"

National New Haven Bank v. *Northwestern Guaranty Loan Co.,* 61 Minn., 375, 392: "Such limited fund belongs to all of the creditors. Each and all of them are tenants in common in the fund, *to the extent necessary to satisfy the debts;* and the undivided part of the fund belonging to any one creditor can only be ascertained by determining all of the sums due all of the creditors."

It is therefore incorrect to say, as plaintiff's counsel say, or intimate, throughout their brief, that what the stockholder has agreed to pay is the amount of his stock, and therefore he cannot complain so long as he is not called upon to pay more than that. He has agreed to pay only his share of the amount actually required to make up the deficiency in corporate assets to pay corporate debts, not exceeding the amount of his stock. The amount of his stock is merely the outside limit of his possible liability; or, as the Statute of 1899 terms it, "the maximum of liability" (Section 7, P. E., 10).

The present contention of the plaintiff is well answered in *Converse* v. *Aetna Nat. Bk.,* 64 At., 341, 345, 346: "It is immaterial that the assessment was for much less than the full amount of the defendant's double liability. It was not bound to pay anything on account of that liability, except to satisfy corporate debts and the expenses incident to such action as the laws of Minnesota might provide for enforcing the obligations of shareholders to creditors whom the corporation left unpaid, and the costs of any subsequent suit properly brought for similar purposes against itself."

(5) It follows that any stockholder's share of the amount necessary to meet the deficiency in corporate debts can be ascertained, and his liability fixed, only by a proceeding in equity, to which all the creditors and all the stockholders are parties. The necessity for such a judicial determination arises from the very nature of the liability, and the courts of Minnesota have repeatedly so held. The plaintiff's contention that this is recognized as the exclusive remedy because of any provision of statute, is unsupported by reason or authority. The statute —Chapter 76— does not create or define or limit the liability, and does not provide that the remedy which it indicates shall be exclusive. If the legislature had attempted to limit and circumscribe the constitutional liability by providing that an inadequate remedy should be exclusive, it would have exceeded its powers, and the courts would have refused to be bound by its acts. On the contrary, the courts of Minnesota have uniformly decided that, by reason of the nature of the liability, no other remedy would be appropriate or adequate for fixing or enforcing the liability, and for that reason, and not because the statute says so, the remedy provided by chapter 76 is the exclusive remedy; and that if there were no statute on the subject, the courts would devise a remedy along the same lines for the enforcement of the constitutional liability.

In *Allen* v. *Walsh*, 25 Minn., 543, a decision made before the defendants' testators acquired their stock, the court construed a statute imposing on stockholders in banks a double liability in almost the exact language of the constitutional provision, viz.: "The stockholders in each bank shall be individually liable in an amount equal to double the amount of stock owned by them, for all the debts of such bank." The court sustained a demurrer to the complaint on the ground of a defect of parties defendant, in that all the stockholders had not been made parties.

The court said:

"The right determination of this question depends upon *the nature of the liability*, and *the policy of the law* in respect to its enforcement, as indicated by the statutes relating to the subject. * * * The language of this section, that 'the stockholders * * * shall be individually liable * * * for all the debts of the bank,' fairly imports a liability *in*

their individual or private capacities, of all the stockholders to all the creditors of such bank. Each and every creditor has the right to look to the individual responsibility of each and every stockholder as a security for his claim. The extent of this liability, however, is limited in the case of each stockholder, to double the amount of his stock, though within this limit it is an absolute and unconditional one, which attaches immediately upon the creation of the corporate debt, for which he is answerable to the creditor as upon an original indebtedness. Being created for the benefit of all the creditors, they all have an equal right to enforce their respective claims against each and every stockholder, and, if the bank is insolvent, with few or no assets, to participate equally in whatever proceeds may be realized out of the total liabilities, in proportion to the amount of such, their respective claims. As between the bank and its stockholders, the former stands in the position of the principal debtor, primarily responsible for the corporate debts, and liable to reimburse the latter for any payments made by them upon account of its obligations. As between the stockholders themselves, the equitable right of contribution exists, and arises in case either pays more than his just and proportionate share of the corporate indebtedness, and thereby to that extent relieves the others from responsibility on account of their individual obligations in respect thereto.

It is obvious that these respective rights and obligations can be adequately protected and enforced only through an exercise of the equity powers of the Court, and in an action wherein all the parties in interest are present and represented. * * *

As further indicating the legislative intention upon this subject, the General Statutes of 1866, which contain the statutory provisions upon banking and the individual liability of stockholders, also provide a special and *adequate remedy* for enforcing the liability, closing up the affairs of the bank in case of insolvency, and for the final adjustment of the rights of all the parties having any interest in the matter. Gen. St., C. 76. This chapter applies to all corporations. * * *

It is obvious, from an examination of these sections of Chapter 76, that the remedy they provide contemplates a single action, in which all persons having or claiming any interest in the subject of the action shall be joined or properly represented, and their respective rights, equities and liabilities finally settled and determined. *This accords with the general policy of the law* as it has existed in this State since 1853. * * *"

This construction of the language of the statute there in question obviously compelled the same construction of the same language in the Constitution; and the subsequent decisions of the Supreme Court of Minnesota have uniformly applied to the constitutional liability the principles enunciated in *Allen* v. *Walsh*.

Patterson v. *Stewart*, 41 Minn., 84, 90, 91: "The question as to the proper remedy to enforce the personal liability of stockholders or directors or officers for corporate debts depends so much upon the terms of particular statutes, or the remedial systems of different states, that not much aid can be obtained from the decisions of other courts. But we think it will be found generally true that, unless a particular remedy is prescribed by statute, the form of the remedy, whether by action at law by each creditor against one or more stockholders or officers, or by bill in equity in which all persons in interest or to be affected are made parties, is made to depend *upon the character of the liability*. If its object is to create a common fund, limited in amount, for the benefit of all creditors, or all of a particular class, so that if one were allowed to proceed alone he might exhaust the fund or get more than his share; or if the liability was only for the deficiency of corporate assets, or only for the excess of debts contracted over the amount permitted by the charter, so that an accounting is necessary; or if for any similar reason an action at law would be inadequate to furnish a complete remedy or protect the rights of all persons interested,—*the courts have generally held, in the absence of any express statutory provision, that a suit in the nature of a bill in equity, bringing in all interested parties, must be resorted to.* Hornor *v.* Henning, 93 U. S., 228, is an example of this kind, and *these considerations were given much weight* in *Allen* v. *Walsh* (25 Minn., 543) and *Johnson* v. *Fischer* (30 Minn., 173), *in determining that the exclusive remedy was under chapter 76.*"

In re Martin's Estate, 56 Minn., 420, 422, 423: "This personal liability was evidently intended to provide for the contingency of a deficiency of corporate assets, which remain the primary fund for the payment of corporate debts. *Hence, it is evident no action or proceeding can furnish a complete remedy, or protect the rights of all persons interested, except*

one which brings in all interested parties,—the corporation, all the stockholders, and all the creditors. And *for these reasons* the courts generally hold, and in the absence of any statutory provision, that to enforce such a liability, created for such a purpose, the only remedy is by an action or proceeding to which all those interested are made parties, so that the rights and liabilities of all may be adjusted."

Hanson v. *Davison*, 73 Minn., 454, 461: "The remedy for enforcing the liability must, in the first instance, *from the nature of the liability*, be an equitable action. G. S., 1878, c. 76 (G. S., 1894, c. 76) indicates and regulates to some extent the remedy, leaving to the court the duty of making the remedy effectual by an application of the principles of equitable procedure. This statute prescribes the exclusive remedy only to the extent that an equitable action of the character therein indicated must be first instituted for the enforcement of the liability of stockholders. *Such an action, though provided by statute, is essentially an equitable proceeding;* and the rules of equity are to be followed, unless inconsistent with the statute. *If chapter 76 were repealed, equity would find an adequate remedy for the enforcement of the liability.*"

These decisions express the general rule, which has been applied by this Court and by other courts to similar cases (see cases cited, P. E., 40, 41).

Pollard v. *Bailey*, 20 Wall., 520, 525: "It is certain that no stockholder is liable for more than *his proportion* of the debts. This proportion can only be ascertained upon an account of the debts and stock and a *pro rata* distribution of the indebtedness among the several stockholders. The proper action, therefore, to enforce the liability is one in which such an account can be stated and distribution made. Such an action calls specially for the exercise of the powers of a court of equity, *which can bring before it all the necessary parties and adjust all their rights.* Every stockholder, when called upon to perform his obligations, has the right to require that the extent thereof shall then be determined once for all, as well that which he is under to his associate stockholders as that to the creditors. Otherwise he might be made to respond to the creditors under one rule and obtain his relief from the other stockholders under another. The provision, therefore,

for a proportionate liability *is equivalent to a provision for an appropriate form of equitable action to enforce it.*"

In *Terry* v. *Little*, 101 U. S., 216, the statute imposed a liability in substantially the same language as that used in the Constitution of Minnesota, and this Court took the same view of the nature of the liability and of the method of its enforcement as that taken by the Minnesota courts, saying, at page 217: "The remedy must always be such as is appropriate to the liability to be enforced."

The foregoing decisions declare the nature and extent of the liability, and the method for fixing its amount and for enforcing it. A substantial change in the contract in any of these respects impairs its obligation. As was said in *Green* v. *Biddle*, 8 Wheat., 1, at page 84:

"The objection to a law, on the ground of its impairing the obligation of a contract, can never depend upon the extent of the change which the law effects in it. Any deviation from its terms, by postponing, or accelerating, the period of performance, which it prescribes, imposing conditions not expressed in the contract, or dispensing with the performance of those which are, however minute, or apparently immaterial, in their effect upon the contract of the parties, impairs its obligation."

In determining whether the obligation of the contract has been impaired, the question is not whether or not the new law is wiser or more beneficial than the old—a question upon which the parties differ. That is a proper consideration in legislating for the future; but with regard to existing contracts, the only question is, whether any material change is made in the contract.

Webster v. *Bowers*, 104 Fed., 627, 628: "The fact that the remedy provided by the later statute is, on general principles, more in harmony with the justice of a situation like the one in question, does not justify the impairment of the plaintiff's contract with the stockholder."

Myers v. *Knickerbocker Trust Co.*, 139 Fed., 111, 117: "With the policy of this later law, we are not here concerned. It may well be, that it is wiser and more equitable to make this stockholder's liability an asset of the corporation, and

either to allow a receiver to collect from all stockholders, and account pro rata to all creditors, or to accomplish the same result by a creditors' bill, in which all creditors may be parties and all stockholders defendants. But the law of the contract was not of this character at the time the liability of the defendant to the plaintiff accrued. The only question before us is, whether the law of 1904 works an impairment of the contract existing between plaintiff and defendant at the date of its passage."

The argument of plaintiff's counsel that the liability is statutory as well as contractual does not change the question. Obviously, the legislature of Minnesota could not impose any new or different duties on existing stockholders without their consent, any more than it could change their existing contract.

To take up the argument with regard to the particular changes which the new statute made in the contract:

(1) The addition of the expenses of the receivership. (P. E., 31-33.)

The authorities cited in support of the proposition, that stockholders were liable for such expenses before 1899 (D. E., 60-62), do not, it is submitted, support this view.

Harper v. *Carroll*, 66 Minn., 487, was an action to enforce, not the double liability created by the Constitution, but the liability of stockholders in banks imposed by section 2501 of the General Laws of 1894. The Court included the expenses of the receiver on the express ground that the statute contemplated the appointment of a receiver to enforce the liability. The liability created by the constitution is one which no receiver could have enforced before 1899, because it was not assets of the corporation.

In *Frost* v. *St. Paul Bond & Investment Co.*, 57 Minn., 325, the Court allowed the receiver to pay his expenses out of proceeds of stock subscriptions and other corporate assets,—not out of the double liability.

First Nat. Bank v. *Winona Plow Co.*, 58 Minn., 167, decided no question concerning the expenses of the receivership.

It stands to reason that if this liability could not be enforced by a receiver, and if the stockholders did not agree to respond to a receiver, they did not agree to pay the expenses of a receiver. The allowance of these expenses is sought to

be justified as an incident of the appointment of a receiver to collect the liability. But if the stockholders did not agree to such appointment, manifestly they have not submitted to its incidents.

The argument that a trust fund must bear its own expenses is an argument in favor of the defendants. The expenses in such a case are borne by the beneficiaries of the fund; they diminish the fund, and do not add to it. So, in *Helm* v. *Smith-Fee Co.*, 79 Minn., 297, cited by plaintiff's counsel (D. E., 59), one creditor suing on behalf of all was allowed a counsel fee out of the fund, thus throwing upon all the creditors the burden of the expense of the proceedings taken on their behalf. No one appears to have thought of adding this expense to the stockholders' assessment.

The passage cited from *Richmond* v. *Irons*, 121 U. S., 27, 65 (D. E., 61), tends to give an erroneous impression as to what was there decided. The Court there draws a distinction between the case of an assessment by a receiver, or, in the case of National banks, by the Comptroller of the Currency, in which case his expenses are recoverable; and the case of a liability directly to creditors, where only costs of suit can be recovered, and not any other expenses. If the passage cited be taken in its context, the meaning becomes clear:

"The purpose for which the receiver was appointed was to collect the proper *assets of the bank* and reduce them to money, so that they might be applied to the payment of its creditors. This office he performed, and *the fund so realized* may be and was properly charged with the expenses of its collection, but the receiver was not necessary to the enforcement of the liability of the stockholders in this suit. That liability was in progress of enforcement by the creditors themselves. Nothing was necessary to that end except the ordinary procedure by means of a master to ascertain what amount of debts was due, to what creditors, with the names of the stockholders who were such on the books of the bank at the date of its suspension, and the number of shares held by each. The case *differs in this respect* from that of an involuntary liquidation under the supervision of the Comptroller of the Currency. The receiver appointed by him is *the only person authorized to enforce the liability of the stock-*

holders, as well as to collect and distribute the assets of the bank; everything to be done must be done by and through him, and in his name; he is the only person charged with all the active duties and responsibilities of the liquidation of the bank, including the enforcement of the individual liability of the stockholders. The fund realized for distribution must, of course, include the costs and expenses necessarily incurred by him in the performance of these statutory duties. *The equivalent for them, in the case of creditors who upon the voluntary liquidation of the bank, seek to enforce the individual liability of the stockholders, is the ordinary costs of the court taxable in the cause.* No receiver is necessary in ordinary cases, and there is nothing in the circumstances of this case to make it an exception. Whatever costs and expenses should be paid on account of the receivership in this case, beyond any allowance made heretofore and paid, if any, *should come out of the creditors at whose instance the receiver was appointed, and not out of the stockholders.*"

The defendants here, in making their contract, entered into an obligation to creditors only, which could not be enforced by a receiver, and therefore, under the decision in the case last cited, they could not have been obliged to pay a receiver's expenses. In imposing a liability for such expenses, the statute of 1899 added a liability which did not exist before, and thereby impaired the obligation of the contract.

(2) The imposition of liability for claims other than debts contracted in the course of the corporate business (P. E., 33 & 34);

(3) the additional liability for "probable" debts to meet a "probable" deficiency (P. E., 34-37); and

(4) the additional liability for the probable expenses of collecting from other stockholders (P. E., 37),

the plaintiff's brief does not undertake to justify.

(5) The change in the nature of the liability (P. E., 37-46).

This change plaintiff's counsel seek to justify as a change of remedy, notwithstanding the radical nature of the change. The authorities cited in support of their contention all fall within one or the other of the classes described in defendants' brief (P. E., 43-46).

In *Hill vs. Merchants' Insurance Co.*, 134 U. S., 515, the only change was in the mode of proceeding. The new statute substituted for an action in equity against a stockholder for unpaid stock subscriptions, a proceeding against him by motion in the action against the corporation. The stockholder's liability was not changed, nor was he deprived of his right to be heard. The Court said, at p. 525: "The statute of 1879 *did not enlarge this liability*, for it authorized an execution against a stockholder, where there was no corporate property to be levied on, only 'to the extent of the amount of the unpaid balance of such stock by him or her owned.' While, under the original charter of the company, he was liable to a suit in equity, under the statute of 1879 he was liable to be proceeded against by notice and motion in the action in which judgment was rendered against the corporation. *In either mode he had opportunity to make defence.*"

In *Commonwealth vs. Cochituate Bank*, 3 Allen, 412, the new statute provided that the assessment proceedings might be instituted by receivers, instead of by bill holders, but the liability was in no way changed, nor was any change made in the parties entitled to be heard; the only change was in providing who should be plaintiff. This was a mere question of mode of proceeding, and did not affect any party's rights.

The Court said, at p. 45: "But upon looking at the provisions of St. 1860, c. 167, it will be found that this assessment is to be wholly under the supervision of this Court, and *upon due notice to be given to the parties*. Practically, the proceeding by assessment under this statute will in every case present all those questions which would arise in a bill in equity by a bill holder against stockholders, involving, of course, the question of the amount of assets of the bank to be applied to the payment of bills, the amount of bills outstanding, the individuals liable to be charged as stockholders, as well as the amount for which each is chargeable. As we understand this

statute, we must assume that *the sum to be assessed upon each stockholder is the same for which he would have been chargeable in the case of a bill in equity by the bill holders.*"

In *Story vs. Furman*, 25 N. Y., 214, and in *Walker vs. Crain*, 17 Barb., 119, as in the *Cochituate Bank* case, the only change made was in the person who might be plaintiff, the new statute providing that the assessment proceedings might be instituted by trustees instead of by creditors. That no other change was made clearly appears from the review of this decision, as well as of the statute of 1852, in the later case of *Cuykendall vs. Corning*, 88 N. Y., 129, 137, where the Court, discussing the effect of the statute of 1852 on corporations organized under earlier statutes, said:

"Assuming that the trustees, or the receiver, appointed in proceedings under the acts of 1852 and 1853, succeed to the rights of creditors to enforce the liability of stockholders, they can enforce no other or greater liability than that created by the act of 1848. The transfer of the right of action of the creditors to the trustees or receiver *does not enlarge or change the liability of the stockholders*, and the trustee or receiver can assess stockholders only to the extent of their liability and *can recover only upon the same allegations upon which the creditors to whose rights they succeed could have recovered.* Under the act of 1811, the only allegations necessary in an action against a stockholder were the indebtedness of the corporation, the dissolution, a deficiency in the assets to pay the debts, and the ownership by the defendant of a certain amount of stock. All the stockholders were then equally liable for the deficiency to the extent of their stock, and a uniform assessment upon all according to the act of 1852, was just."

These decisions are authorities not for, but against the validity of a change, which increases the stockholder's liability, changes the method of fixing its amount, and substitutes an *ex parte* assessment for an assessment on notice.

The contention, that the remedy may be changed at will is, it is believed, answered by the authorities cited at pages 41 to 43 of the brief for plaintiffs in error. But assuming the principle to be as stated by plaintiffs' counsel, it assumes the

existence of a definitely fixed liability, and a remedy extrinsic to it, and no part of the contract, which can be changed at will. That is not the case here. The equitable remedy recognized by the decisions as the exclusive remedy before 1899, is not merely the method of enforcing the liability, but is also *the only method of fixing the amount of the liability.*

Here is no agreement to pay a sum fixed in advance. The agreement is to pay such sum as the court of equity may fix in the proceedings contemplated by the parties; not to pay such sum as may be fixed by an *ex parte* assessment. The proceeding contemplated is a part of the contract, for unless and until the amount payable is determined in the manner agreed upon, there can be no liability to pay any sum. The case is, therefore, not at all to be compared to a case where a defendant has agreed to pay a given sum on demand or on a day certain, and objects to a change in the mode of compelling him to pay what he has agreed to pay. These stockholders have agreed to pay such sum as shall be fixed as their share by equity proceedings on notice to them; and until such proceedings are taken and the sum so paid, they are not bound to pay anything. They cannot be compelled to pay a different sum, fixed in a different way, for that was not their contract.

Howarth vs. Lombard, 175 Mass., 570, holds that the method provided for fixing the amount of the liability enters into and is a part of the contract. See extract from the opinion cited below.

A contract to pay the stockholder's share, fixed on notice to him, is quite a different thing from a contract to pay an arbitrary sum fixed without notice to him. If the two contracts were placed side by side and offered to an intending stockholder, is there doubt which he would choose? Would he regard the difference between them as immaterial, and not affecting any substantial right?

II.

The want of due process of law.

Plaintiff's counsel apparently concede that, as there has been no such notice to the defendants as to constitute due process of law, he must stand or fall upon the proposition that they were represented by the corporation in the assessment proceedings; that whether they were so represented depends on their relationship to the corporation created by their becoming stockholders; and that this relationship in turn is determined by the law of Minnesota at the time when they acquired their stock.

The decisions of the courts of Minnesota have established as the law of that State the following propositions:

1. The corporation represents the stockholders in the conduct of the corporate affairs.

2. It does not represent them as to matters which are not part of the corporate affairs.

3. The double liability is one owing from the stockholders to the creditors, and is not assets of the corporation, nor a matter regarding which the corporation can bind the stockholders.

In re People's Live Stock Insurance Co., 56 Minn., 180, 185: "Indebtedness of stockholders upon subscriptions to the stock held by them is indebtedness, not to the creditors of the corporation, but to the corporation itself. Such indebtedness is an asset of the corporation. Without a statute authorizing it, a creditor cannot reach it, except through the corporation. * * * But the constitutional or statutory liability is directly to the creditors. The corporation cannot enforce it. It is no part of its assets."

Minneapolis Baseball Co. v. *City Bank*, 66 Minn., 441, 446: "It appears from this summary of the decisions of this court that unpaid stock subscriptions, property transferred by the corporation in fraud of its creditors, and capital fraudulently withdrawn are assets in the hands of the receiver as to cred-

itors, though not as to the corporation except as to the first, and that he may recover them, because they were at one time assets of the corporation, and as to creditors they remain so; but that, as to the liability of stockholders for the corporate debts, *it is not, and never was, a corporate asset,* for it is due directly to creditors; and that the receiver cannot enforce it, in the absence of a statute authorizing him to do so. This conclusion is also supported by the authority of the text writers. Morse, Banks, § 696; Thompson, Stockh., § 342; Cook, Stock, Stockh., & Corp. Law, § 216; Morawetz, Priv. Corp., § 869."

Richardson v. *Merritt,* 74 Minn., 354, 362: "This superadded liability is not a corporate asset, and can only be enforced for the benefit of creditors, and then only to the extent of paying the corporate debts remaining unpaid after the corporate assets have been exhausted. On the other hand, the money due as the purchase price of stock is a corporate asset, which may be disposed of by the corporation while it is a going concern, the same as any other corporate asset."

Willius v. *Mann,* 91 Minn., 494, 503: "It is true that, in proceedings against a corporation, the corporation, when duly summoned and brought into court, represents the stockholders; and all stockholders, in so far as the interests and affairs of the corporation are concerned, are bound by the judgment of the court. But the stockholders are not bound by any such judgment as respects their individual interest or liability."

Hale v. *Allinson,* 188 U. S., 56, 67: "That was a contract in behalf of the creditor, with which the corporation had nothing to do."

These decisions, it is submitted, dispose of the plaintiff's contention, that the double liability is to be regarded, like that for stock subscriptions, as corporate assets, with regard to which the corporation represents the stockholders. The law in Minnesota is well settled, that the two liabilities rest upon an entirely different footing.

Opposed to these decisions is only the decision of the state court upon the very point here before the Court, in *Straw & Ellsworth Mfg. Co.* v. *Kilbourne Boot & Shoe Co.,* 80 Minn., 125, 134, 135, where the Court, after pointing out that premium notes are corporate assets collectible by a receiver, says: "There can be no difference, in principle, in respect to the

question now under consideration, between an action to recover on premium notes, when insolvency of the company has made an assessment on the members necessary, and an action to enforce a stockholders' liability, constitutional or statutory; and it has already been said by this Court in *Hanson* v. *Davison*, 73 Minn., 454, 462, an action of the nature last mentioned, that 'in principle, there can be no difference in this respect between an action to enforce an unpaid subscription and one to enforce a stockholder's liability.' " The court appears to have overlooked the fact that both the doctrine which it there announced, and the *dictum* upon which it relied as authority, were contrary to the law of Minnesota as settled by the decisions cited above; and this fact was pointed out by this Court, with respect to the *dictum* in *Hanson* v. *Davison*, in *Hale* v. *Allinson*, 188 U. S., 56, 64, and this Court there held that the prior decisions established the law of Minnesota on this point, and could not be regarded as overruled by the later *dictum*.

That this last decision of the state court upon the very point now presented to this Court for its determination, cannot be regarded as binding on this Court, or as effective to change the rule established by the prior decisions of the courts of Minnesota and of this Court, is well settled.

Burgess v. *Seligman*, 107 U. S., 20, 33, 34: "So when contracts and transactions have been entered into, and rights have occurred thereon under a particular state of the decisions, or when there has been no decision of the State tribunals, the Federal Courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State courts after such rights have accrued."

Douglass v. *County of Pike*, 101 U. S., 677: "After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is, to all intents and purposes, the same in its effect on contracts as an amendment of the law by means of a legislative enactment."

Great Southern Hotel Co. v. *Jones*, 193 U. S., 532, 548: "But the decision of the state court, as to the constitutionality of the statute in question, having been rendered after

the rights of parties to this suit had been fixed by their contracts, the Circuit Court would have been derelict in duty if it had not exercised its independent judgment touching the validity of the statute here in question."

Upon the point now under discussion, this Court has already exercised its judgment in *Hale* v. *Allinson, supra,* and reached the same conclusion as the State courts; and it is now asked to reverse itself, on the federal question here presented and that, too, on the authority of a case which was decided two and one-half years before the decision in *Hale* v. *Allinson,* but which did not then lead this Court to change its view.

If the contention of these defendants is sound, that it was the settled law of Minnesota applicable to the contract, that the double liability is not a corporate asset, it is of no value to review decisions dealing with other statutes which relate to corporate assets such as stock subscriptions, or which are construed as making the double liability corporate assets, and placing them on the same footing as stock subscriptions. If under the law of Minnesota the double liability is not a corporate asset, as to which the corporation can represent the stockholder, how can it alter the case that in some other jurisdictions the liability is regarded as a corporate asset?

But apart from this, it is believed that the rule obtaining in Minnesota is the same rule that is recognized everywhere else, viz., that in the absence of some constitutional or statutory provision to the contrary, the individual liability of stockholders for debts is not an asset of the corporation, and the corporation does not represent the stockholders with respect to it. The cases cited by plaintiff's counsel are believed to fall within one or other of the classes enumerated at pages 52 to 54 of the brief for plaintiffs in error.

In citing from the opinion of the referee in *Converse* v. *Stewart* (D. E., 50, 51), the fact was apparently overlooked that his decision was reversed on appeal (105 App. Div., 478). The extract from his opinion shows that he proceeded on the assumption that the double liability was a corporate asset. In this he was doubtless misled by the statement in the opinion in *Straw & Ellsworth Mfg. Co.* v. *Kilbourne Boot & Shoe Co.,* 80 Minn., 125, 134, 135, above referred to.

Upton v. *Hansbrough*, 3 Biss., 417; *In re Republic Ins. Co.*, 3 Biss., 452; *Hawkins* v. *Glenn*, 131 U. S., 319; *Glenn* v. *Liggett*, 135 U. S., 393, and *Great Western Telegraph Co.* v. *Purdy*, 162 U. S., 329, involved assessments for stock subscriptions. The Court said, in the case last cited, at page 336: "The order of that Court was in effect, as it was in terms, simply a 'call or assessment' upon all stockholders who *had not paid for their shares in full*. It was such as the directors might have made before the appointment of a receiver; and in making it the Court, having by that appointment assumed the charge of the *assets and affairs of the corporation*, took the place and exercised the office of the corporation."

Kennedy v. *Gibson*, 8 Wall., 498, 504, goes on the ground that the receiver of a national bank, as the agent of the United States, is expressly directed by the National Bank Act to enforce the individual liability of the stockholders, and that stockholders in national banks contract, with reference to this statute, to pay an assessment levied by the Comptroller of the Currency and sued upon by the receiver. *Bailey* v. *Sawyer*, 4 Dillon, 463, is to the same effect.

Hancock National Bank v. *Farnum*, 176 U. S., 640, holds only that a stockholder in a Kansas corporation who has contracted with reference to an existing statute which makes a judgment against the corporation conclusive against the stockholder, is bound by his agreement.

Howarth v. *Lombard*, 175 Mass., 570, and *Howarth* v. *Angle*, 162 N. Y., 179, dealt with a provision of the Constitution and statutes of Washington, which imposed a double liability on stockholders. The courts of Washington had, unlike the courts of Minnesota, construed the provision as creating a liability to be fixed by an assessment without notice, and to be collected by a receiver. It was held that these decisions were conclusive as to the meaning of the statute and that the stockholders who had contracted with reference to it were bound by its terms as so construed.

In *Howarth* v. *Angle*, 162 N. Y., 179, 187, the Court said: "The defendant took stock in the Tacoma bank subject to the burden of the law, *which he impliedly agreed to bear, as he could not otherwise have become a stockholder*. That burden is an asset, vested in the receiver, and can be enforced in

this State the same as a promissory note, not because the laws of Washington are in force here, but *because the defendant voluntarily assented to the conditions upon which the bank was organized.*"

The principle underlying all the cases cited by plaintiff's counsel and distinguishing them from the case at bar, is, that a stockholder *who has agreed to an assessment without notice* is bound thereby. This principle is nowhere better expressed than in the opinion in *Howarth* v. *Lombard, supra,* as illustrated by the following excerpts: "The undertaking is as if one subscribing for stock expressly agreed to take and hold it under a previously prepared contract in writing that all who should become holders of the stock should pay the amount of their subscriptions to the corporation when needed, and should pay the additional sum to create a fund for creditors, if the corporation should become insolvent, and a receiver should be appointed to collect it. * * * The question arises, how far these proceedings in the court of Washington are binding on the defendants. The stockholders must be assumed to have understood the statute from the first as it has been construed by the court. They must be presumed to have agreed that on the insolvency of the corporation a receiver might be appointed by the court, and the affairs of the corporation administered, and the amount of its assets and liabilities determined, and the deficiency ascertained under the order of the court, and an assessment to meet this deficiency made ratably upon all who were then stockholders. This is the only proper way of accomplishing the object of the statute, and the statute, *as construed by the local courts,* means this as plainly as if every part were expressed. * * * *The undertaking of the stockholders relates directly to the payment of amounts, so to be ascertained.* * * * That such adjudications are binding upon absent stockholders in reference to assessments for unpaid subscriptions has often been expressly decided. The rule is discussed at length in *Hawkins* v. *Glenn, supra. Under the statute now before us* we can see no difference in principle between the secondary liability and the primary liability. * * * In reference to each, the subscriber for stock *contemplates the same kind of proceedings, and a collection by the same officer,* who represents not only such assets as the

corporation has for all purposes, but the right to a special fund, which is an asset that can be collected and used for creditors only. * * * The general liability under the statute in Washington is like that under the national banking act of the United States, and the court has construed the statute in such a way as to make the practical application of it substantially the same. Under that act assessments made by the Comptroller are binding upon stockholders, although made without notice to them. U. S. Rev. Sts., § 5234. Casey *v.* Gallj, 94 U. S., 673. U. S. *v.* Knox, 102 U. S., 422. Richmond *v.* Irons, 121 U. S., 27, 55. Bailey *v.* Sawyer, 4 Dillon, 463. Brown *v.* Smith, 88 Fed., 565. *The reason for holding them binding is that the obligation is contractual, and that it contemplates the possibility of such an assessment.*"

This case is authority in favor of the defendants. The same reasoning which concludes a stockholder by an assessment without notice on the ground that he has agreed to be bound by such a proceeding, must operate to hold that a stockholder who has contracted to pay an assessment made on notice to him cannot be bound by an assessment made without notice. To establish a waiver of the constitutional right to personal notice, plaintiff must show that the defendants in some way consented to an assessment without notice to them. No fact is adduced to show any such consent, nor has any authority been cited which holds that an assessment without notice was ever contemplated in Minnesota before 1899. The authority is all the other way, to the effect that no such proceeding was recognized by the law of Minnesota.

Commercial Bank vs. Azotine Manufacturing Co., 66 Minn., 413, 416: "Findings as to the amount of shares of stock held by non-resident stockholders, over whom the court had acquired no jurisdiction, or any determination as to their liability, would have been useless, for no one would have been bound by such findings."

Hale vs. Allinson, 188 U. S., 56, 80, 81: "All the non-resident stockholders were but nominal parties in the Minnesota suit. Their names were merely placed in its title. No service of process was ever made on one of them, and as the suit was not one in which service by publication of process could be ordered, there was nothing in the nature of the suit to give

them notice or to enable the court to give judgment against them without their appearing."

In the same case, this Court, in criticizing the *dictum* above referred to in *Hanson vs. Davison, supra,* refers, at 188 U. S., p. 64, to the strong dissenting opinion by Mr. Justice Canty in that case. In that opinion occurs the following passage, at 73 Minn., pp. 463, 464:

"When the corporation is a going concern, it represents all of its stockholders in defending actions brought against it, and that is the reason why the stockholders are bound by a judgment taken against it at such a time. But, after the corporation goes into liquidation, it ceases to represent its stockholders,—at least, as to their superadded liability.

The majority admits this by admitting that all of the stockholders within the jurisdiction are *necessary parties to an action to enforce that liability.* It is the first time I have ever heard the doctrine laid down by a court that you may neglect to bring in a necessary party to the action, and yet bind him as conclusively by the result as if he had been brought in. It seems to me that this is a most extraordinary doctrine."

Plaintiff's counsel contend that the defendants as stockholders in a Minnesota corporation must be deemed to be citizens of Minnesota. If this contention were admitted, it would not help the plaintiff's case, because a State cannot deprive its own citizens of property without due process of law any more than citizens of other States; but the contention itself is based on decisions which are manifestly inapplicable to the present case. The decisions relied on are those holding that for purposes of jurisdiction, the stockholders of a corporation will be presumed to be citizens of the State of incorporation. If authority be required for the proposition that those decisions have no bearing on a question involving jurisdiction over an individual stockholder, such authority is found in the decision of this court in *Doctor* vs. *Harrington*, 196 U. S., 579, 586, 587, where the Court said, in overruling the contention that a stockholder cannot sue his corporation in the federal courts because he is deemed to be a citizen of the same State: "This is based on

the assumption adopted by this court, that stockholders of a corporation are citizens of the State which created the corporation—an assumption physically possible but hardly true in a single instance; and appellants here contend that it should be classed with the fictions of the law and subject to one of their fundamental maxims, and cannot be carried beyond the reasons which caused its adoption necessarily require. It is, however, more of a presumption than a fiction, but whether we regard it as either it cannot be pushed to the end contended for by appellees. * * * A corporation is constituted, it is true, of all its stockholders, but it has a legal existence separate from them—rights and obligations separate from them; and may have obligations to them. * * * *It is one thing to give to a corporation a status, and another thing to take from a citizen the right given him by the Constitution of the United States.*"

To the argument that an assessment without notice is a wise and proper mode of enforcing stockholders' liabilities under modern conditions, we answer, first, that it has always been regarded as elementary justice, that a party shall not be subjected to liability without an opportunity to be heard; and second, that if a State deems it wise to provide for an assessment without notice, it can require stockholders to consent to such a proceeding as a condition of acquiring stock in a corporation of the State, but as to stockholders who have not so consented, the Constitution of the United States inhibits it from assessing them without notice.

III.

The Receiver's right to sue in a foreign jurisdiction.

Plaintiff contends that the receiver has the right to sue, because the statute of 1899 "*vested the title* to these individual liabilities in the receiver, as a trustee for creditors" (D. E., 26); and this "inasmuch as the individual liabilities of the stockholders are *assets* vested in the Receiver" (D. E., 5, 6).

That the double liability is not and never was assets, and could not be collected by a receiver, has, it is believed, been abundantly shown under the preceding point.

Did the Statute of 1899 make that an asset which was not an asset before? Plaintiff claims that it did, because it authorized the receiver to sue for their collection. But this does not follow. A chancery receiver has frequently authority to sue, as custodian, or as an officer of the court, without being invested with title. The only authorities cited by plaintiff in support of his contention are *Kennedy* v. *Gibson*, 8 Wall., 506; *Richmond* v. *Irons*, 121 U. S., 27; and *Stief* v. *Hart*, 1 N. Y., 20. The first two decisions were cases under the National Bank Act, the policy of which was held to be to make the stockholders' liability actually an asset of the corporation. *Stief* v. *Hart*, *supra*, is an authority in favor of the defendants. It holds that a statute authorizing a sheriff to levy on and sell a pledgor's interest impliedly authorizes him to take it from the pledgee's possession—but obviously it does not give him title.

But if it be assumed, for the sake of the argument, that the Statute of 1899 undertook to transfer the title to this liability from the creditors to the receiver, what becomes of the plaintiff's contention that the statute was a mere change in the remedy which did not alter the rights of any party? Can so substantial a change in the relations of the parties as taking away the creditors' property and transferring it to a receiver, and making the stockholders answerable to a receiver of the corporation, instead of to the creditors with whom they contracted, be justified as a mere change in remedy?

It is submitted that the plaintiffs' argument presents the following dilemma: either the statute did not change the substantive rights of the parties, in which case the receiver has acquired no such title as is essential to give him a standing here, or else the statute did change the substantive rights of the parties by transferring the creditors' title to the receiver, and thereby impaired the obligation of the existing contract between the creditors and the stockholders.

Respectfully submitted,

LAURENCE ARNOLD TANZER,

Of Counsel for Plaintiffs in Error.

FILE COPY.

Supreme Court of the United States.

OCTOBER TERM, 1906.

Nos. 278 and 279.

APR 12 1907

JAMES H. MCKENNEY,

MAYER S. BERNHEIMER ET AL., as Executors of the Last Will and Testament of Simon Bernheimer, deceased,

Plaintiffs in Error,

vs.

THEODORE R. CONVERSE, as Receiver of the Minnesota Thresher Manufacturing Company,

Defendant in Error.

MAX DREY ET ALS., as Executors of the Last Will and Testament of Isaac Bernheimer, deceased,

Plaintiffs in Error,

vs.

THEODORE R. CONVERSE, as Receiver of the Minnesota Thresher Manufacturing Company,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

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Supreme Court of the United States.

OCTOBER TERM, 1906.

Nos. 278 and 279.

MAYER S. BERNHEIMER ET AL., as Executors of the last will and testament of Simon Bernheimer, deceased.

Plaintiffs in Error,

VERSUS

THEODORE R. CONVERSE, as Receiver of the Minnesota Thresher Manufacturing Company,

Defendant in Error.

MAX DREY ET ALS., as Executors of the last will and testament of Isaac Bernheimer, deceased,

Plaintiffs in Error,

VERSUS

THEODORE R. CONVERSE, as Receiver of the Minnesota Thresher Manufacturing Company,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

These two cases are identical in the questions presented, and even in the amounts of the two judgments in the Circuit Court, and are, by stipulation, to be heard together on a single record.

They come to this Court on writs of error to the Circuit Court of the United States for the Southern District of New York, to review the judgments rendered therein upon verdicts directed by the court, upon the trial of the two actions before the Hon. GEORGE C. HOLT and a jury. The actions were tried on March 9, 1906, and the verdict in each case was the sum of $4,275.

The two actions were brought by the defendant in error, Theodore R. Converse, as Receiver of the Minnesota Thresher Manufacturing Company, a corporation of the State of Minnesota, to enforce the individual liability of Simon Bernheimer and Isaac Bernheimer, under the Constitution of Minnesota, as stockholders in that company; and the original defendants, the plaintiffs in error, are respectively the executors of Simon Bernheimer and Isaac Bernheimer, both of whom had died before the actions were begun.

The cases were tried upon an agreed statement of facts (25, 28).

Statement.

The Minnesota Thresher Manufacturing Company was incorporated under the laws of the State of Minnesota on December 5, 1884. The purpose for which it was formed is set forth in the certificate of incorporation as follows:

"The objects for which this corporation is formed are the purchase of the capital stock, evidence of indebtedness issued by it, and the assets of the Northwestern Manufacturing and Car Company, a corporation existing under the laws of the State of Minnesota, or any portion of said capital stock, evidences of indebtedness or assets, and the manufacture and sale of steam engines of all kinds, farm implements and machinery of all kinds, and the manufacture and sale of all articles, implements and machinery of which wood and iron or either of them form the principal compo-

nent parts, and the manufacture of the materials therein used " (35).

These " assets of the Northwestern Manufacturing and Car Co." comprised bills receivable and accrued interest valued at $1,524,007.48 (38) consisting mainly of " farmers' notes ", given in payment or part payment for machines purchased, which it was thought would be collectible in the hands of a company prepared to keep those machines in repair (30-31).

At that time the Northwestern Manufacturing and Car Company was in the hands of a Receiver appointed by the District Court of Washington County, Minnesota; and the Receiver carried on its business under the orders of the Court (26).

On October 27, 1887, under order of the court, the property and plant of the Northwestern Manufacturing and Car Company, including all bills receivable, farmer's notes and other assets, which had been acquired by it or by the Receiver in the conduct of its business were sold to and purchased by the Minnesota Thresher Manufacturing Company. And on January 5, 1888, the same were conveyed to the last named company by the Master appointed by the court to make such conveyance. And shortly thereafter the Thresher Company entered upon the conduct of its business and continued therein until December, 1900 (40).

On December 14, 1900, the property and business of the Thresher Company were placed in the hands of a Receiver by order of the Circuit Court of the United States for the District of Minnesota in a suit for the foreclosure of a mortgage upon its property, and this Receiver continued the business until the mortgaged property was sold under decree of foreclosure on May 25, 1901; the property so sold was conveyed to the purchaser on July 8, 1901 (40).

On May 6, 1901, the Merchants National Bank of St. Paul obtained a judgment in the District Court of Ramsey County, Minnesota, against the Thresher Company; and, executions thereon having been returned wholly unsatisfied, the judgment creditor brought suit against the Thresher Company for the

appointment of a receiver and the enforcement of the individual liability of its stockholders in the District Court of Washington County, Minnesota, and the plaintiff was appointed Receiver therein on August 16, 1901, and qualified, and entered upon the discharge of his duties and still continues therein (26-27, 54-55).

The plaintiff, as such Receiver, did not come into the possession of any property or assets of the Thresher Company other than the books and records of that company and such right as was vested by him by law and by the orders and decree of the District Court of Minnesota to enforce the individual liability of the stockholders of the company (27).

Thereafter, in said suit in the District Court of Washington County, Minnesota, such further proceedings were had in conformity with the provisions of the statutes of Minnesota set forth in the complaint herein that an order was made in that suit, dated December 22, 1902, reciting among other things that it appeared to the satisfaction of the court that copies of the order of April 16, 1902, directing notice to parties interested were duly published, mailed and served in the manner therein prescribed, and that due notice of said hearing was duly given to the defendant company and to each stockholder of record as directed by said order, and that a hearing was duly had thereunder; and thereupon ordering that an assessment of thirty six per cent. of the par value of each share of the capital stock of the Thresher Company, to wit, the sum of eighteen dollars upon each share thereof be and the same hereby is assessed upon and against each and every share of said capital stock, and upon and against the person, corporation or party liable as a stockholder, and that each and every person, corporation or party liable as such stockholder be and he is hereby directed to pay to said Receiver—the plaintiff herein—at his office in the City of Stillwater, Washington County, Minnesota, within thirty days after the date of the order said sum of eighteen dollars per share; and further ordering that said Receiver upon failure to pay the amount assessed against any shares of stock within the time

specified, forthwith institute and prosecute such action or actions or other proceedings against the parties liable in any court having jurisdiction, whether in the State of Minnesota, or elsewhere, as he should deem necessary or proper for the recovery of the same (27, 65–67).

On appeal to the Supreme Court of Minnesota this order was affirmed (27, 68–72).

The two decedents, Simon Bernheimer and Isaac Bernheimer, were in their lifetime residents of New York, as are also the defendants, their executors, and neither they nor any of the defendants ever resided in the State of Minnesota or were served with process therein. Notices of the above mentioned proceedings were mailed by the Receiver to Simon Bernheimer and Isaac Bernheimer addressed to them at No. 320 Broadway, New York City, that being their address on the books of the Thresher Company, and at the time of such mailing the Receiver did not know of the death of either of them (101, 122).

Upon the admitted facts the argument here presented on behalf of the defendant in error rests upon the following propositions which, in their succession, lead to the conclusion that the judgments of the Circuit Court should be affirmed.

1. The plaintiff, as Receiver, is entitled to maintain actions in New York, inasmuch as the individual liabilities of the stockholders are assets, vested in the Receiver.

2. The obligations and liabilities of the stockholders rest upon a contract in which they submit themselves to the jurisdiction and control of the State of Minnesota.

3. The legislation of the State of Minnesota in providing an effectual remedy for enforcing the obligations and liabilities of the stockholders does not impair the obligation of their contracts.

4. The assessment made by the Minnesota court is conclusive upon the stockholders.

5. The stockholders' liability is statutory as well as contractual.

It is hardly necessary to point out that the Stock Corporation Law, of New York, relates only to New York corporations and to foreign corporations doing business in New York, and does not assume either to fix and declare, in § 54, the liabilities of stockholders in corporations of other states, or to fix and declare, in § 55, the limitation of liabilities of stockholders in corporations of other states. Nor would it be competent for the legislature of New York to say when and under what circumstances a stockholder in a corporation of another state should cease to be such stockholder.

The statute of limitations of New York applicable to this and to all cases is contained in the New York Code of Civil Procedure, Chapter IV, and the limitation upon an action to recover upon a liability created by statute is six years (§ 382), excepting where the action is against "a director or stockholder of a moneyed corporation, or banking association," in which case the limitation is three years (§ 394).

POINT FIRST. The plaintiff, as Receiver, is entitled to maintain actions in New York and elsewhere to enforce the individual liabilities of the defendant's testators and other stockholders, inasmuch as those liabilities are made assets for the payment of corporate obligations and are vested in the Receiver.

The individual liability of stockholders in Minnesota corporations arises under Section 3 of Article X of the Minnesota constitution. The language is :

" Liabilities of Stockholders. Each stockholder in any corporation (excepting those organized for the purpose of carrying on any kind of manufacturing or mechanical business) shall be liable to the amount of stock held or owned by him."

This provision is self executing, as was held in *Willis v. Mabon*, 48 Minn. 140 and *McKusick v. Seymour, Sabin & Co.*, 48 Minn. 158. " The liability of a stockholder is fixed and measured by the constitution *alone*." *Willis v. Mabon* was approved in this respect by this court in *Whitman v. Oxford National Bank*, 176 U. S., 559, 562. Thus the constitution, in this particular, had the effect of a superior statute, passed by the People of the State in the direct exercise of their sovereign power, and its effect, as establishing and fixing the liability of stockholders was not subject to alteration or diminution by any power less than that which had created it. That is, nothing less than an amendment to the constitution, could limit or take away this liability.

The Minnesota Thresher Co., the corporation of which the plaintiff is Receiver and the defendants are stockholders, is not within the class excepted by the terms of the constitution. This was held in *State v. Minnesota Thresher Co.*, 40 Minn. 213, and again, directly, in the action in which the present assessment was laid, reported as *Merchants National Bank v. Minn. Thresher Mfg. Co.*, 90 Minn. 144.

This is in conformity with the long line of decisions of the Minnesota courts and upon a principle laid down in the earlier decisions and consistently followed down to the present time.

Thus it was said in *First Nat. Bank v. Winona Plow Co.*, 58 Minn., 167 : " We are of the opinion that by its articles of incorporation this defendant is both a manufacturing and a mercantile corporation. Such articles of incorporation provide for the 'purchase' and 'sale of plows, cultivators and other farming and agricultural implements of all kinds,' as well as for the 'manufacture,' 'repair' and 'sale' of those articles. * * * The fact that the stockholders, as found by

the court, did not intend to carry on anything but an exclusively manufacturing business, and that the corporation never did carry on any other business except such commission business, can make no difference. 'And if the corporation is organized for the purpose as declared in the articles of association of carrying on both a manufacturing business, and also some other kind of business not properly incidental to or necessarily connected with a manufacturing business, the mere fact that the corporation never exercised all its powers, and never in fact engaged in or carried on anything but a manufacturing business, will not bring it within the constitutional exception.' *Arthur v. Willius*, 44 Minn., 415" (1894).

In *Anderson v. Anderson Iron Co.*, 65 Minn., 281, it was held, that as the articles of association provided for "buying, selling, leasing and dealing in mineral lands" the corporation was not exclusively a mechanical one. "It is true that the articles of incorporation here in question are no broader than is authorized by G. S., 1894, sec. 2827, and at section 2829 declares that a corporation so organized 'shall be deemed to exist * * as a manufacturing and mechanical corporation under the constitution and laws of this state.' But the very purpose of the constitutional amendment was to prevent the legislature from exempting the stockholders of such corporations as this from liability; and so far as section 2829 controvenes the constitution, we must hold it void."

Upon precisely the same principle; that is, that the character of the corporation is determined solely by its articles of association, it was held in *Nicollet Nat. Bank v. Frisk-Turner Co.*, 71 Minn., 413, that where the articles provided solely for carrying on a manufacturing business, the fact that the corporation had done some business outside of that which was authorized, did not render the stockholders personally liable. "The liability of stockholders cannot rest on any such uncertain or transitory basis." Where the power to do such independent business was given by the articles, "in going beyond the manufacturing business, the corpora-

tion still kept within the limits of its charter, but in so doing the stockholders became liable, not because they had violated the law, but because their articles authorized the corporation to carry on a business other than that of manufacturing, though in strict compliance with that authorized by the articles themselves. The distinction is obvious" (1898).

In *Senour Mfg. Co. v. Church Paint & Mfg. Co.*, 81 Minn. 294, the appellant maintained that proof of intention on the part of some of the incorporators to engage in outside business, but to limit the purpose declared in the articles of incorporation to manufacturing solely would render the stockholders individally liable. This the court answered by saying, "In such cases the corporation would be a manufacturing corporation as to some of the stockholders, and a mercantile corporation as to others, and the courts would be annoyed and perplexed in unravelling controversies as to the exact status of the stockholders. We cannot open the door to such confusion, as we hold, without further discussion that, in proceedings to enforce the individual liability of stockholders of a corporation, the articles of incorporation are the sole criterion as to the purposes for which the corporation was formed."

The authorities were fully considered by the Supreme Court of Minnesota on appeal from the decree levying the present assessment (68–72) and the doctrine above stated that the articles of association are the sole criterion was reaffirmed.

The interpretation of the constitution of a state by the highest court of the state is regarded as binding upon this court when no federal question is involved. This rule, which is too firmly established to admit of discussion, was recognized in the very recent case of *Middletown Bank v. Railway Co.* 197 U. S. 391, 404, where it is said: "We have not been referred to any decision of the Ohio Supreme Court directly involving the question whether the provision of the constitution referred to is self-executing or not. If there were any such decision *we should follow it.*"

In *Morley v. Lake Shore R'y Co.*, 146 U. S., 162, 166, the first question which arose was that of the proper construction of a statute of New York. This the court answered by saying: "This question is answered for us by the decision of the Court of Appeals of New York in this very case." * * * In *Louisiana v. Pillsbury*, 105 U. S., 278, 294, this court, speaking by Mr. Justice FIELD, says: 'Whether such a construction [by judicial decisions upon a clause of the *state constitution*] was a sound one is not an open question.' * * * 'The rule of construction adopted by the highest court of the state, in construing their own constitution, and one of their own statutes in a case not involving any question re-examinable in this court under the twenty-fifth section of the judiciary act, must be regarded as conclusive in this court.' *Provident Institution v. Massachusetts*, 6 Wall., 611, 630, 'The construction given to a statute of a state by the highest tribunal of such state is regarded as a part of the statute, and is as binding upon the courts of the United States as is the text.' *Leffingwell v. Warren*, 2 Black, 599, 603. The meaning of a state statute, declared by the highest court of a state, is conclusive upon this court. *Randall v. Brigham*, 7 Wall., 523, 541."

In *Forsyth v. Hammond*, 166 U. S., 506, 518, Mr. Justice BREWER, writing the opinion of the court, said: "The construction by the courts of a state of its constitution and statutes is, as a general rule, binding on the federal courts. We may think that the supreme court of a state has misconstrued its constitution or statutes, but we are not at liberty to therefore set aside its judgments. That court is the final arbiter as to such questions."

And in *Sioux City R. R. Co. v. N. A. Trust Co.*, 173 U. S., 99, 107, it was said by Mr. Justice WHITE: "It is an elementary principle that this court in interpreting a state statute will construe and apply it as settled by the court of last resort of the state, and will hence only form an independent judgment, as to the meaning of the state law, when there was no binding

construction of such state statute by the court of last resort of the state."

And the settled construction of the Minnesota constitution as applicable to the present case appears to be fully recognized in *First Natl. Bank v. Converse*, 200 U. S. 425, 438.

The constitution of Minnesota in establishing this liability must have contemplated, (1) that all stockholders should be placed on the same basis of liability; (2) that in many cases such stockholders would be divided into two classes, those resident in Minnesota, and those resident in other states; and (3) that the legislature would see to it that adequate remedies were provided to reach both classes of stockholders. And every person who became a stockholder in either class must have contemplated subjecting himself to whatever liability attended the act of becoming a stockholder.

In this situation, there were two courses which the legislature might adopt. The one was, to devise a remedy through which the constitutional liability of stockholders might be effectively enforced; the other, to leave the courts of the state to work out suitable and appropriate remedies, through existing and appropriate methods of procedure.

The legislature of Minnesota adopted the first course, and endeavored to provide an adequate remedy in certain statutes which it passed, which was subsequently incorporated in Chapter 76 of the General Statutes of Minnesota, of 1894, in Sections 5897 to 5911 of the same.

The remedy which the legislature thus attempted to provide did not prove to be efficacious. And, upon the well-settled rule that where a particular remedy is provided, it is exclusive, if the remedy was not efficacious, or to the extent to which it proved not to be efficacious, the creditors were remediless, and the protection which the constitution gave to them was brought to nought.

In *Allen v. Walsh*, 25 Minn. 543, it was held that the only remedy to enforce this liability of stock-

holders was provided in this Chapter 76, and that the statute contemplated a *single action*, in which all persons having or claiming any interest in the subject of the action should be joined or particularly represented, and their respective rights, equities and liabilities finally settled and determined ; and, further, that the receiver of an insolvent corporation was not, under the terms of that chapter as it *then* stood, a proper party to bring such action.

As the receiver, then, could not bring such action, manifestly the only parties to bring it were the creditors, or some one or more of them, on behalf of all, or bringing in the remaining creditors as parties defendant. And while it is not impossible that in an action so brought a final equitable adjustment of the affairs of an insolvent corporation might have been reached, and even that a way might have been found to reach and enforce the liabilities of non-resident stockholders, it suffices for present purposes to point out that the remedy evidently proved unsatisfactory in its practical working, as was shown by repeated attempts to enforce those liabilities through the instrumentality of a receiver.

And in this connection it may be observed that if the creditors' rights could be fully enforced under the provisions of this Chapter 76, then the legislation which followed in the Act of 1899 was a mere simplification of the existing remedy ; but if they could not so be enforced, then further legislation was necessary to fulfill the purpose of the constitution, and to give effect to the rights which it secured.

Here it is desirable to consider certain decisions as to the effect of the provisions of the Minnesota statutes, before the Act of 1899, and after it was passed.

William E. Hale was appointed Receiver of the Northwestern Guaranty Loan Company, a Minnesota corporation, in February, 1897, in a suit in equity which had been brought by a creditor in behalf of

himself and all other creditors for the purpose of enforcing the individual liability of stockholders.

In reliance upon the provisions, above referred to, of Chapter 76 of the Minnesota General Statutes of 1894, Hale, as such Receiver, brought an action at law in the Circuit Court of the United States for the District of Massachusetts against a stockholder for the enforcement of his liability.

This is reported, in the first instance, as *Hale v. Hardon*, 89 Fed. 283, which gives the decision of Judge PUTNAM upon the trial of the action before him, in September, 1898. He awarded judgment to the defendant, holding—"First, that the proceeding in which this plaintiff was appointed a so-called receiver is void, so far as this defendant is concerned; and, second, that the plaintiff is not of the class entitled to maintain a suit at law in a jurisdiction foreign to that which vested him with his office."

Upon a writ of error the Circuit Court of Appeals—*Hale v. Hardon*, 95 Fed. 747,—reversed the judgment and ordered a new trial. This left the decision of the Circuit Court of Appeals for the First Circuit in favor of the right of Hale, as such Receiver, to maintain his action at law in other states, under the then existing state of the statute law of Minnesota, viz., Chapter 76 of the General Statutes of 1894.

The same Receiver, Hale, brought a similar action at law, against another stockholder, in the Circuit Court of the United States for the Northern District of New York. This was tried before Judge COXE without a jury, and is reported as *Hale v. Hilliker*, 109 Fed. 273. In obedience to the decision of the Circuit Court of Appeals for the First Circuit in *Hale v. Hardon*, in 95 Fed. 747, the right of action was maintained, and judgment was awarded to the plaintiff.

Upon writ of error to the Circuit Court of Appeals for the Second Circuit, that court, in *Hilliker v. Hale*, 117 Fed. 220, reversed the judgment below, holding that a receiver appointed by the court merely under its general equity powers, was not vested with the title

to a cause of action to enforce the stockholders' liability which would support an action by him against the stockholder in a jurisdiction other than that of his appointment.

This left the Circuit Courts of Appeals of the First and Second Circuits in direct opposition to one another upon the question of the right of the Receiver, Hale, to maintain actions against stockholders in any jurisdiction outside of the State of Minnesota.

The same Receiver, Hale, brought still another action, against another stockholder. This was a suit in equity in the Circuit Court of the United States for the Eastern District of Pennsylvania,—*Hale v. Allinson*, 102 Fed. 790. Issue was taken by demurrer, on the ground that the complainant's remedy was at law, and the court sustained the demurrer on that ground, citing *Hale v. Hardon*, in 95 Fed. 747.

On appeal to the Circuit Court of Appeals for the Third Circuit, this decision was affirmed,—*Hale v. Allinson*, 106 Fed. 258, the court expressing itself as strongly of the opinion that the Receiver could maintain no action outside of Minnesota, but confining its decision to the proposition that the complainant's only remedy was by action at law.

Before following the history of these litigations further, it is important to take notice of some other matters, which will be seen to have a material bearing upon their final result and effect.

Leonard Howarth was appointed Receiver of the Traders Bank of Tacoma, a corporation of the State of Washington, by a court of that state, in proceedings instituted in the year 1894 for winding up the affairs of the corporation.

The constitution of Washington, Art. 12, § 11, provided: "Each stockholder of any banking or insurance corporation or joint stock association shall be individually and personally liable, equally and ratably, and not one for another for all contracts, debts and engagements of such corporation or association accruing while they remain such stockholders, to the extent of the amount

of their stock therein at the par value thereof, in addition to the amount invested in such shares." The statutes of the State of Washington repeat the declaration of individual liberty in almost the identical words of the constitution.

It is to be noted, in passing, that there is a radical difference in the declaration of the constitution of Minnesota and that of Washington in one respect. The liability of the Minnesota stockholder is coextensive with the obligations of the corporation, and limited only by the par value of the stock "held or owned by him" so that the solvent stockholders may be held liable up to the par value of their stock for all obligations of their corporation; while the liability of the Washington stockholders is, like that of stockholders in national banks, limited to the proportion which the par value of his stock bears to the total capital stock "for all contracts, debts and engagements of such corporation." But, subject to these different limits as to its *extent*, the nature and character of the liability is the same in both cases.

The legislature of Washington, unlike that of Minnesota, did not attempt to provide a remedy to enforce the constitutional liability, but left the courts of that state to work out appropriate remedies as occasion might arise. And this the courts of that state proceeded to do. They held in *Cole v. Satsop R. R. Co.*, 9 Wash., 487, and in *Hardin v. Sweeney*, 14 Wash., 129, that a receiver appointed to wind up the affairs of an insolvent corporation became a receiver for all the creditors, and a *quasi* assignee, and that the individual liability of stockholders was a trust fund for the payment of creditors, vested in the receiver.

In the proceedings in the Washington court in which Howarth was thus appointed receiver an assessment was laid upon the stockholders and the receiver was directed to collect it. He brought actions for the recovery of the amount of such assessments in the state courts of New York and Massachusetts, and in both his right to maintain his action and to recover was upheld.

In *Howarth v. Angle*, 162 N. Y., 179, 187, the court, in sustaining his judgment, said: "The defendant took stock in the Tacoma bank subject to the burden of the law, which he impliedly agreed to bear, as he could not otherwise have become a stockholder. That burden is *an asset*, vested in the receiver, and can be enforced in this state the same as a promissory note, not because the laws of Washington are in force here, but because the defendant voluntarily assented to the conditions upon which the bank was organized. * * * While the liability is, for convenience, frequently called statutory, because the statute, which is the constitution of the bank, affixed the obligation to the ownership of stock, it is in fact contractual and springs from an implied promise. There is no substantial difference between the liability for an unpaid balance on a stock subscription, which is an express contract to take the stock and pay for it, and the liability for the unpaid deficiency of assets assumed by the act of becoming a member of the corporation through the purchase of stock, from which a contract is implied to perform the statutory conditions upon which stock may be owned. The fact that the former is the promise of a principal and the latter of a surety, does not affect the question. The express promise runs to the corporation, while the implied promise runs to the creditors, and may, according to the common law of the state where it was made, be enforced for the benefit of creditors by a receiver of the corporation appointed to wind up its affairs. The latter promise is not a part of the capital stock of the bank, but is a *substitute*, required by statute, for the personal liability of a partner at common law, and has the same object, which is the protection of creditors."

In *Howarth v. Lombard*, 175 Mass., 570, 574, 579, the court, affirming the judgment there in favor of the same receiver, said: "It is to be noticed under this statute that stockholders, merely by subscribing for stock, without an express promise to pay for it, are bound in all corporations to pay the amount of their unpaid subscriptions, if needed, and in banking corporations

to pay *as much more*, if it is called for to satisfy creditors. * * * Although the liability is founded on a statute, there is a contractual element entering into it. The undertaking is as if one subscribing for stock expressly agreed to take and hold it under a previously prepared contract in writing that all who should become holders of the stock should pay the amount of their subscriptions to the corporation when needed, and should pay the *additional* sum to create a fund for creditors if the corporation should become insolvent and a receiver should be appointed to collect it." And, again: "The remaining question is whether an action upon the liability so determined can be maintained by the receiver in his own name. It has been held that an ordinary appointment as a receiver, made in another state, will not enable the appointee to sue in this Commonwealth in his own name. If he has a right of property as assignee, he may maintain an action. * * * In the present case the receiver is called by the court in Washington a *quasi* assignee for creditors. He is charged with the administration of a trust fund which does not take form or come into actual existence until after his appointment, and he is the only person who can collect it. By virtue of his official relation to the corporation and its creditors he is the owner of the legal title to this fund as a trustee for the creditors. A suit could not have been brought in the name of the corporation, and he is the only person who can now, or who ever could, legally demand and collect the money. We are of opinion that the action is rightly brought in his name."

Now it had been held in *Allen v. Walsh*, 25 Minn. 543, that the remedy provided by chapter 76 of General Statutes of 1894 was exclusive. It had been held in *Minneapolis Base Ball Co. v. Bank*, 66 Minn. 441, 446: "If it be desirable, in order to secure a speedy, economical, and practicable method of enforcing the liability, to invest the receiver with such power [to sue], it must be done by statute. This

has already been done in cases where the receiver of an insolvent banking corporation is appointed on the application of the superintendent of banks. Such a receiver is expressly authorized to enforce the individual liability of stockholders." It had been held upon the trial of *Hale v. Hardon* that the receiver provided for could not sue in Massachusetts. The same question was raised in other suits, as in *Finney v. Guy*, 106 Wisc. 256, and in *Hale v. Allinson (supra)*, and if not already decided adversely to the right of such receiver, it was recognized as a serious one. If the receiver was not entitled to sue stockholders in other states, then the difficulty was, clearly, that the remedy afforded by chapter 76 was not only exclusive, but also ineffectual; it was actually an obstacle to the liability of the stockholders. As was said by the court in *Hanson v. Davison*, 73 Minn. 454, "If chapter 76 were *repealed*, equity would find an *adequate* remedy for the enforcement of the liability."

Such was the situation when the legislature of Minnesota felt itself called upon to act. It might have adopted the suggestion in *Hanson v. Davison (supra)* by repealing chapter 76, thus leaving the courts to work out a remedy, as had been done in Washington. But it evidently deemed it wiser and safer to work out the remedy for itself, and to give to the remedy the sanction of positive law, leaving to the courts only the duty of following and applying it. Accordingly the Minnesota legislature enacted the Act of 1899, the material portions of which, so far as they affect the present questions, are set forth in the complaint herein (9-11). And, in so doing, the Minnesota legislature adopted, in all substantial respects, the identical remedy which had been worked out by the courts of Washington, the efficacy of which had been approved in *Howarth v. Angle* and *Howarth v. Lombard (supra)*.

I. The efficacy of this remedy for the enforcement of the liability of stockholders in other states has been judically recognized.

It was after the passage of this Act of 1899 that Horace R. Robinson, who had been appointed Receiver of another Minnesota corporation, brought his action against a stockholder for the enforcement of the liability of the defendant as such stockholder, in the Circuit Court of the United States for the District of Massachusetts, and recovered judgment. The defendant took a writ of error to the Circuit Court of Appeals for the First Circuit.

The decision of the latter court is reported as *Burget v. Robinson*, 113 Fed. 669, and was an affirmance of the judgment in favor of the Receiver, the court saying that the plaintiff below stood as the representative of the creditors of the corporation.

This discussion of these cases may seem tedious, but the outcome is illuminating, if not indeed an absolute demonstration of the right of Converse, the Receiver herein, to maintain the present actions in New York, as will now be shown.

Hale, the Receiver of the Northwestern Guaranty Loan Company, who had been defeated in his action against a Pennsylvania stockholder by the decision of the Circuit Court, affirmed in the Circuit Court of Appeals, *Hale v. Allinson*, 106 Fed. 258, petitioned this court for a writ of *certiorari*, and the petition was granted on May 13, 1901 (181 U. S. 619).

The cause was fully heard in this court, and the decision is reported as *Hale v. Allinson*, 188 U. S. 56. The decision, affirming that of the Circuit Court of Appeals, and hence denying the right of the Receiver to maintain his action in Pennsylvania, after noting the fact that the Minnesota Supreme Court had held that a receiver could not maintain such an action in the courts of that state, which of itself ought "to compel an affirmance of the judgment," goes on to say (pp. 66–67): "The suit now before us was commenced in November, *1898*. * * * It seems entirely clear that the receiver provided for in section 5906 of the above quoted statute, while not the receiver mentioned in section 5897, is yet simply one to be appointed in aid of the court to work out the provi-

sions of the section, if the court choose to appoint him, and by section 5907, the court, if it appear that the corporation is insolvent, may proceed, *without appointing any receiver* to ascertain and enforce the liabilities of stockholders in the creditors' action. The receiver, if he be appointed, is *not given power* to represent the creditors or to maintain, as representative owner or trustee, an action, inside or outside the state, to enforce the liability spoken of." "We are of opinion, following the decisions of the highest court of Minnesota, that the statutes of that state do not provide for the appointment of a receiver to recover as such the amount of the added liability of the non-resident shareholders to creditors of an insolvent corporation. They do not provide that such liability shall be assets of the corporation, to be recovered by the receiver and payable to its creditors when such liability is enforced and the money recovered. * * * We are thus brought to the fact that this is a plain and simple case of the appointment, authorized by statute, of a receiver by a court of equity in the exercise of its general jurisdiction as such court, with no title to the fund in him, and where such receiver acts simply as the arm of the courts without any other right or title."

Thus the denial of the right of the receiver in *Hale v. Allinson* to enforce the individual liability of stockholders is placed upon the failure of the then existing statutes of Minnesota to vest the receiver with any title or any power "to maintain, as representative owner or trustee, an action, inside or outside the state, to enforce the liability."

These very elements, thus found wanting in the former statutes, these very statutory powers and title, the absence of which had compelled the denial of the right of the receiver in *Hale v. Allinson*, were supplied in the Act of 1899, clearly, fully and distinctly.

Burget, the stockholder who had been held liable, *Burget v. Robinson (supra)*, in the action brought by the Receiver, Robinson, who was appointed by the

Minnesota court *after* the passage of the Act of 1899, also petitioned this court on October 20, 1902, for a writ of *certiorari* to review the judgment against him; and his petition was denied on January 19, 1903 (188 U. S. 739), *the very day* on which the decision of this court in *Hale v. Allinson* (188 U. S., 56) was rendered.

Thus this court denied the right of the receiver in the one case, and *simultaneously* refused to deny it in the other. The only conclusion to be drawn is that this court found that there was a radical distinction to be drawn between the two cases. And this distinction is readily seen in the fact the Act of 1899 had vested the receiver in the *Burget* case with the title and right of action in other states, which was found wanting in the receiver in the *Hale* case.

But this is not all. After Burget's petition for a *certiorari* had thus been denied, he applied to the Circuit Court of Appeals for a rehearing there. This was denied.

This latter decision is reported as *Burget v. Robinson*, 123 Fed., 262. In the opinion then delivered it is said (pp. 267-268): "*Hale v. Hardon*, like *Hale v. Allinson*, was based entirely on Gen. Stat. Minn., 1894, c. 76, as pointed out by the opinion of the Supreme Court in the latter case. But the present plaintiff relies both upon that statute and on the alleged authority and rights given him by Chapter 272, p. 315, of the General Laws of Minnesota for the year 1899, the details of which it is not necessary to recite, except to state that the plaintiff claims that the Act of 1899 vested in him a certain title and interest in addition to any rights which could arise under General Statutes of 1894." Then, after quoting from the language of this court in *Hale v. Allinson*, the opinion goes on: "Referring to the expression, 'the statute did not confer upon the receiver the right to proceed to enforce the liability of stockholders,' the statute of 1899 is, perhaps, susceptible of a different construction; indeed, of such a construction as to bring this case within *Relfe v. Rundle*, 103 U. S., 222, which the Supreme Court also refers to." And then, after considering the principles fol-

lowed by this court in its disposition of petitions for writs of *certiorari*, the opinion concludes as follows: "It is, therefore, unsuitable to presume that the Supreme Court entertained a petition for a writ in *Hale v. Allinson*, and entered judgment therein against the receiver, but refused the writ in the present case, and yet had any impression that the two involved the same question, and thus practically introduced the very 'diversity of judgments' which it says it was the purpose of the statute to avert."

The foregoing opinion was delivered on May 1, 1903. It appears by papers in the office of the clerk of this court that on May 15, 1903, Burget presented to this court a further petition, praying for a rehearing of his application for a *certiorari*, specifying sixteen grounds, among which are—that the decision in his case was at variance with that in *Hale v. Allinson*, and that the Receiver, Robinson, had no title to support an action by him outside of Minnesota. And in the same manner it appears that the prayer of this further petition was denied on June 1, 1903.

Under these circumstances it seems impossible to regard the action of this court in entertaining the *Hale* case, and giving it full consideration, and in declining to entertain the *Burget* case which was before it at the same time, and in rendering its decision in the one and denying a hearing in the other upon the same day, and in adhering to the denial in the *Burget* case after its attention was fully called to the assumed identity of the questions presented by each, as leading to any other proper or legitimate conclusion, consistent with the character and dignity of this court, than that its action was, and was intended to be, in legal effect, tantamount to an affirmance of the judgment against Burget.

If anything more were wanted to give added weight to this conclusion, it might be found in the circumstance that,—intermediate between the denial of Burget's petition on January 19, 1903, and the presentation for a rehearing thereon, on May 1, 1903, —there was argued in this court on February 27 and

March 2, 1903, and decided on April 6, 1903, on writ of error to the Supreme Court of Wisconsin, the case of *Finney v. Guy*, 189 U. S., 335, which presented the question of the right of the receiver of an insolvent Minnesota corporation, appointed prior to the Act of 1899, to maintain an action in Wisconsin to enforce the liability of a stockholder,—that is, the identical question which Burget claimed was presented in his own case,—and, in a carefully considered opinion, the doctrine of *Hale v. Allison* was reaffirmed.

II. The efficacy of the statute to vest the title to the stockholders' liabilities in the receiver, is clear from the terms of the statute itself.

These terms are fully set forth in the complaint and record herein (9-11, 42-46). The act in chapter 272 of the Laws of Minnesota for 1899.

Section 1 directly authorizes the procedure which is provided in the subsequent sections whenever a receiver has been appointed by a District Court of the state for a Minnesota corporation "whose stockholders or any of them, are liable to it or to its creditors, or for the benefit of its creditors, upon or on account of any liability for or upon or growing out of, or in respect to the stock at any time held or owned by such stockholders, respectively, whether under or by virtue of the constitution and laws of said State of Minnesota, or any statute of said s ate, or otherwise."

Section 2 provides that on the petition of such receiver the District Court shall appoint a time for hearing, "and shall direct such notice of such hearing to be given by the party presenting such petition, by publication or otherwise, as the court in its discretion may deem proper."

Section 3 provides that at such hearing the court shall consider such proofs as shall be offered by the receiver, or by any creditor, officer or stockholder of the corporation, "as to the probable indebtedness of said corporation, and the expenses of said * * * receivership and the probable amount of assets avail-

able for the payment of such indebtedness and expenses, and also as to what parties are or may be liable as stockholders of said corporation, and the nature and extent of such liability." If it appears to the satisfaction of the court that the ordinary assets will be insufficient to meet these payments and that it is necessary to resort to the individual liabilities of the stockholders the court shall thereupon, by order direct and levy a ratable assessment upon all parties liable as stockholders, for such percentage of their liability upon each share of stock as the court in its discretion may deem proper, "taking into account the probable solvency or insolvency of the stockholders, and the probable expenses of collecting the assessment," and shall direct the amount so assessed to the receiver, within a time specified.

Section 4 provides that this order shall direct the amount so assessed upon each share of stock from the parties liable, and shall authorize the receiver to prosecute actions, against all failing to pay within the time specified, "wherever such party may be found, whether in this state or elsewhere."

Section 5 makes such order and assessment conclusive upon all parties liable "as to all matters relating to the amount of, and the propriety of, and necessity for the said assessment."

Section 6 makes it the duty of the receiver, upon the expiration of the time specified, to institute actions against all parties liable, who have failed to pay the amount of their assessments, for the recovery of the same, and adds: "Such actions may be maintained against each stockholder, severally, in this state or any other state or country where such stockholder, or any property subject to attachment, garnishment or other process in an action against such stockholder may be found."

By section 11 it is further provided that if the amounts realized shall exceed the amount required for the purposes of the assessment, the surplus shall be divided among the stockholders from whom the assess-

ments shall have been collected, *pro rata*, according to the amount of their respective contributions.

The legislative grant of authority to the receiver to maintain these actions for the recovery of the amounts of the several assessments must necessarily be held to vest in him all title needful to the bringing and maintenance of such actions. The whole scheme of the statute is to treat the individual liabilities as assets to be realized by the receiver, as a trustee for the creditors, which he is made in fact, if not in name.

No statute can impose upon an official representative, created under its provisions, an obligation, a positive duty to bring an action, without *ipso facto* conferring upon him whatever title may be required to support it. As was said in *Stief v. Hart*, 1 N. Y. 30, "Whenever a power is given by statute, everything necessary to making it effectual, or requisite to attain the end, is implied."

The situation is substantially the same as that created by the terms of the National Banking Act. The receiver therein contemplated is not expressly declared to be vested with the individual liability of the stockholders. But the Act says that the receiver "may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders." It was said in *Kennedy v. Gibson*, 8 Wall. 506: "The receiver is the *statutory assignee* of the association, and is the proper party to institute all suits. * * * He represents both the creditors and the association, and when he sues in his own name it is not necessary to make either a party to the suit." There is nothing in the Act, beyond the provision above quoted, to support this holding that the receiver is the statutory assignee of the corporation, except its manifest spirit and purpose. The individual liabilities are not expressly declared to be assets, but the uniform construction of the Act treats them as such, because that is the necessary effect of the direction to the receiver to enforce them.

To the same effect is *Richmond v. Irons*, 121 U. S., 27, 50. "It thus appears that the enforcement of this liability is a part of the liquidation of the affairs of the bank; at least so closely connected with it as to constitute but one continuous transaction. * * * Admitting that this liability is not strictly an asset of the bank because it could not be enforced for its benefit as a corporation, nor in its name, yet it is treated as a means of creating a fund, to be applied with and in aid of the assets of the bank toward the satisfaction of its obligations. The two subjects of applying the assets of the bank and enforcing the liability of the stockholders, however *otherwise* distinct, are, by the statute, made connected parts of the whole series of transactions which constitute the liquidation of the affairs of the bank."

Every word of this might have been written, with equal force, and like application, if the court had been considering the liability of a stockholder in a Minnesota corporation, under the constitution of Minnesota, and the scheme adopted by the Legislature of Minnesota for the enforcement of that liability.

III. To sum up then the argument upon this Point First.

The Constitution of Minnesota imposed upon stockholders of the Minnesota Thresher Company a general and several liability for all legal obligations of the corporation to an amount equal to the par value of the stock respectively owned or held by them.

The legislature of Minnesota, after first devising a remedy which was not efficacious, passed the Act of 1899 which was manifestly intended to supply a remedy which should be efficacious.

The Act of 1899, in legal effect, vested the title to these individual liabilities in the receiver, as a trustee for creditors, and directly authorized the receiver to maintain actions for their collection wherever the stockholder should be found.

The receiver thereby became a "statutory assignee"

within the principle declared by this Court in *Kennedy v. Gibson (supra)*, and in conformity with the rule followed in *Relfe v. Rundle* (*supra*), and with the decisions of the Supreme Court of Massachusetts and the Court of Appeals of New York in the *Howarth* cases *(supra)* which held the receiver appointed by the courts of Washington under like conditions to be a "*quasi* assignee."

The right of a Minnesota receiver appointed and proceeding under the Act of 1899 is recognized and, in legal effect, approved by this Court in the *Burget* case *(supra)* when it reversed the judgment in *Hale v. Allinson (supra)* where the receiver had been appointed before the Act of 1899 was passed and refused to entertain the *Burget* case, although its attention was explicitly drawn to the claim that the two cases presented the identical question. And this, also, although this court had *in the meanwhile* held in *Finney v. Guy (supra)* that a Minnesota receiver appointed before the Act of 1899 could not maintain such action.

It would seem, then, in the light of reason and of authority, that the right of the present Receiver, CONVERSE, to maintain these present actions in the federal court in New York, is not open to question.

POINT SECOND. The obligations and liabilities of the stockholders of the Minnesota Thresher Manufacturing Company rest upon a contract by which they have submitted themselves to the jurisdiction and control of the State of Minnesota.

In a long series of decisions, beginning with *Bank of the United States v. Deveaux*, 5 Cranch 61, this court, in upholding the federal jurisdiction on the ground of diversity of citizenship in cases where corporations were parties, has established the rule that while for some purposes a corporation may be regarded as "an

invisible, intangible thing, a mere incorporeal legal entity," yet in considering the question of jurisdiction the courts could look beyond the corporate name and notice the character of the individual members. "The term citizen ought to be understood as it is used in the Constitution, and as it is used in other laws. That is, to describe *the real persons who come into court*, in this case under their corporate name."

In *Marshall v. Baltimore & Ohio RR.* 16 How. 314, 328, it is said: The presumption arising from the habitat of a corporation in the place of its creation being conclusive as to the residence or citizenship of those who use the corporate name and exercise the faculties conferred by it, the allegation that the 'defendants are a body corporate by the act of the General Assembly of Maryland,' is a sufficient averment that *the real defendants* are citizens of that state."

And, again, in *Muller v. Dows*, 94 U. S. 444, 445, it is said: "A suit may be brought in the federal courts by or against a corporation, but in such a case it is regarded as a suit brought *by or against the stockholders* of the corporation; and for the purposes of jurisdiction, it is conclusively presumed that all the stockholders are citizens of the state which, by its laws, created the corporation."

This doctrine is not set forth as a legal fiction. This court had no power, nor has it ever assumed to exercise the power, to resort to the expedient of a legal fiction in order to evade or overcome the plain requirements of the Constitution. In thus declaring, *firstly*, that the corporation is substantially identical with its members, and that a suit by or against a corporation is to be regarded as a suit by or against all the stockholders of the corporation, it has declared that such is the sound and true legal construction of the situation presented. And in declaring, *secondly*, that for purposes of jurisdiction the stockholders must be conclusively presumed to be "citizens of the state which, by its laws, created the corporation" it has declared a rule of law which, if true at all, must be a rule of general application, and not limited to cases

which present the question of federal jurisdiction based upon diversity of citizenship.

I. The first of these propositions, that the corporation is identical with its members, is but the application of a general principle upon which rests the rule that judgments touching corporate matters and interests, which have been rendered in suits or actions to which the corporation is a party, are conclusive upon its stockholders, and are an estoppel upon them equally with judgments in suits and actions to which the stockholders are individually parties.

This identity of the stockholders with their corporation is too often lost sight of, or ignored, in the legal refinements in regard to the corporation as an abstract entity, vested with rights which are asserted and defended in the corporate name. And these legal refinements are apt to conduce to a general impression that the stockholders are something distinct from the corporation, standing apart, and having only an interest, for profit or loss, contingent upon the success or failure of the adventures which the corporation, as an abstract entity, may undertake and prosecute.

But in all corporate enterprises the stockholders are themselves the adventurers. Whatever is done, is done in their sole interest. The corporate entity is the sum total of themselves, individually. No one else has any interest in the corporate business or in its results. They elect the directors, and, either directly or through the directors, they select all the executive officers. The directors and officers thus constituted are their agents. Whatever the directors and officers do, they do as their agents and on their behalf. For the results of the action of the directors and officers they are responsible to the fullest extent, excepting only in so far as that responsibility is limited by provisions of positive law. And for this reason the courts are swift to enforce the right of the stockholders to call upon these agents for an

account of their stewardship, and that in the very strictest way.

II. The second of these propositions, that the stockholders must be conclusively presumed to the citizens of the state of the corporation, is the application of another general principle, which, upon consideration, will be found to be equally well established with the first; and, in a certain measure, to be a corollary to the first.

1. As jurisdiction over the corporation, in respect of corporate matters and interests, which are the matters and interests of the stockholders, is, in effect, jurisdiction over the stockholders themselves, it should follow that when and where such jurisdiction exists over the corporation it likewise exists, in respect of the *same* matters, over the stockholders individually, through a suit or action by or against them. General jurisdiction over the corporation necessarily exists in the state by which the corporation is incorporated, and it would seem that in respect of corporate matters and interests it should likewise exist there over the stockholders.

When an action which has been brought against a corporation in a state court is removed into a federal court on the ground of diversity of citizinship, the rule that the stockholders are conclusively presumed to be citizens of the state from which the corporation derives its existence is not *created* and *cannot be created* by the act of removal or by the statute of the United States under which the removal is had; but it is, and must be, a rule *already existing*, independently of the statute, and already in full force and operation. For it would clearly not be competent for any act of Congress or any decisions of the federal courts to effect a change in the existing relations between a corporation and its stockholders where those relations have been constituted and established through the incorporation under and by virtue of the laws of the state.

This conclusive presumption must then originate in and flow from the act of incorporation. It must be a legitimate and necessary consequence of the action of the stockholders, individually, in accepting the benefit of incorporations, in becoming members of the corporate body, in becoming collectively the corporate body itself, and in making themselves, *quoad* the corporation and its interests and their interests in it, citizens of the state of the corporation; and this to such supreme degree that they are estopped from asserting, and the courts are justified in ignoring, their actual citizenship, if it does not in fact conform to this presumption.

2. The charter is a contract to which the stockholders are the contracting parties on the one side, and the state which grants the charter is the other contracting party.

It is evident that the identity of the stockholder with his corporation,—the identity which estops him to deny the conclusiveness of a judgment rendered in a suit to which his corporation has been a party, and estops him to assert in corporate matters a citizenship other than in the state of his corporation,—must arise in some way from a compact valuntarily entered into by the stockholder. No such position could be imposed upon him without his consent.

And it is equally evident that this compact is one which is entered into by the stockholder with the state. The state offers certain benefits and privileges to those who desire to become a corporation under its laws, upon the condition that they will submit themselves to the obligations and liabilities which it imposes upon those who choose to avail themselves of those benefits and privileges. The acceptance of the one is the acceptance of the other. Such acceptance is purely voluntary; but when it is given all the elements of a contract are supplied, and a contract is made by which both of the parties are equally bound.

It has been sometimes said that in becoming an incorporator, or in the subsequent acquisition of stock, the stockholder enters into a contract with his corpo-

ration. But this is no more literally true than it would be to say that one who becomes a party to articles of copartnership is thereby entering into a contract with his firm. A partner may enter into a separate and individual contract with his firm, and a stockholder may enter into a separate and individual contract with his corporation; but in neither case is this done by merely becoming a member of a firm or a stockholder in the corporation; in either case the partners or the stockholders enter into the relations, *inter sese*, of joint adventurers, and assume certain obligations to one another, which will be enforced in equity as between themselves; and in each case these obligations to one another arise from the fact that they have united themselves together for the prosecution of a common adventure, for their common interest and benefit.

In the articles of incorporation by which a corporation is usually formed, no word is found of any contract on the part of incorporators or stockholders with the corporation itself. It is an undertaking that the parties will unite in taking upon themselves, collectively, the character of stockholders, and becoming, collectively, a corporation.

Take, for instance, the articles of incorporation by which this very Minnesota Thresher Manufacturing Company was formed (34–36). This instrument states that "We, the undersigned, * * * do by these presents, pursuant to and in conformity with an act of the Legislature of the State of Minnesota, * * * associate ourselves together and hereby form a body politic and corporate." It then goes on to state: First, the corporate name adopted; Second, the objects for which the corporation is formed; Third, the amount and classification of the capital stock; Fourth, the period of duration of the corporation; Fifth, the principal place of business. And it concludes, "We hereby adopt the foregoing articles of association of the Minnesota Thresher Manufacturing Company for the purpose of becoming a body politic and corporate under said name."

This is a distinct and formal acceptance of the offer

of incorporation extended by the state, upon the terms of that offer. It is an acceptance, by the individuals who are thus forming themselves into a corporation of the state, of the terms and conditions upon which that offer is extended, of submission to the laws and jurisdiction of the state in all matters touching corporate interests and their personal relations with it in their character of stockholders. It is a direct contract with the state on their part, and on the part of every person who voluntarily accepts the benefit of the incorporation by becoming a stockholder.

In *Dartmouth College v. Woodward*, 4 Wheat. 518, 656, 657, it was held that the charter of a corporation was a contract on the part of the state which granted it, and that the state could not vary the terms of the charter, to the disadvantage of the corporation and of the interests represented by, and confided to, and conferred upon it, without impairing the obligation of the contract. As there must be two parties to every contract, it is obvious that the contract which the state is not permitted to impair it is equally entitled to enforce. And in this very decision a contract is defined as "A transaction between two or more persons, in which *each* party comes under an obligation to the other and each reciprocally acquires a right to what is promised by the other." It is added: "A corporation is defined by Mr. Justice BLACKSTONE to be a franchise." "To this grant, or this franchise, the parties are, the King and *the persons* for whose benefit it is created, or trustees for them."

In *Farrington v. Tennessee*, 95 U. S., 679, 684, Judge SWAYNE quoted with approval *The King v. Passmore*, 3 T. R. 199, where "Judge BULLER said he 'considered the grant of incorporation to be a contract between the Crown and *a certain number* of the subjects, the latter of whom undertake, in consideration of the privileges which are bestowed, to exert themselves to carry out the objects of the grant."

III. When, then, the stockholders of the Minnesota Thresher Manufacturing Company accepted the grant

of incorporation from the State of Minnesota, they contracted to subject themselves to the jurisdiction of that state in all matters touching the rights and obligations of the corporation, which drew its existence solely from that grant, and in all matters touching their individual rights and obligations as members of that corporation. In respect of all such matters they contracted that, whatever might be their actual residence, they should be conclusively presumed to be citizens of Minnesota. To this extent they agreed to be subject to its laws, and to the process and orders and decrees of its courts, and waived any right to question their jurisdiction or the validity of their proceedings, other than by the ordinary modes of appeal and review.

POINT THIRD. The legislation of the State of Minnesota in providing an adequate and effectual remedy for enforcing the obligations and liabilities of stockholders does not impair any obligation of their contracts.

This discussion relates to the obligation of the contract of the stockholders to be personally responsible, within the limits fixed by the terms of incorporation, for the liabilities of the corporation of which they have become members.

I. The obligation of a contract is the burden assumed by a party entering into a contract of performing some act or making some payment, conditionally or unconditionally.

Sometimes both parties to a contract assume such duties, each to the other or for the benefit of the other. In such case each party is entitled to performance, and any legislation which assumes to deprive

either party of the benefit which is assured to him by the terms of the contract, impairs its obligation as to him.

But where the contract is unilateral, as where, for a consideration, one party agrees to pay money to the other, or for the benefit of the other, or to a person designated by the other, then the sole obligation of the contract is upon the party who undertakes to make such payment. In such cases, and the reports are full of them, the question has always been whether the legislation complained of has impaired the obligation of the contract to the creditor or promisee, by depriving him of a right existing when the contract was made, either by its terms or by the laws which then afforded adequate remedies for its enforcement.

And in such cases the decisions of the courts have always turned upon this identical point. Where remedies have been changed by statute, the only question has been whether the new or substituted remedy was less beneficial to the party entitled to enforce payment, than the old. And the courts have uniformly held that where the new remedy was equally beneficial with the old to the party entitled to enforce the contract, the obligation of the contract was not impaired.

In *Sturges v. Crowninshield*, 4 Wheat., 122, 197, Chief Justice MARSHALL said: "What is the obligation of a contract? And what will impair it? It would seem difficult to substitute words which are more intelligible, or less liable to misconstruction, than those which are to be explained. A contract is an agreement by which a party undertakes to do, or not to do, a particular thing. The law binds him to perform his undertaking, and this is, of course, the obligation of his contract. In the case at bar the defendant has given his promissory note to pay the plaintiff a sum of money on or before a certain day. The contract binds him to pay that sum on that day; and that is its obligation. Any law which releases a part of this obligation, must, in the literal sense of the word, impair it. Much more must a law impair it which makes it wholly invalid, entirely discharges it."

And in *Fourth National Bank v. Francklyn*, 120 U. S., 747, 755, the court said of the statute there under consideration : "As it does not undertake to annul the liability of the stockholders for the debts of the corporation, but only modifies the form of remedy and the rules of evidence, it is not doubted that it is a constitutional exercise of the power of the legislature, even as applied to debts contracted by the corporation before its enactment."

Evans v. Nellis, 187 U. S. 271, had to do with the statute of Kansas, passed in 1899 which made a radical change in the law of that state. Before that any creditor might bring an action directly against any individual stockholder, and recover his debt up to the amount of the stockholder's liability. The act of 1899 assumed to vest all right to enforce the liabilities of the stockholders in a receiver. As was said in *Hale v. Allinson*, in 188 U. S. 56, 65, it "made the stockholder's liability *an asset of the corporation*, to be collected by the receiver." Of such a change, depriving them of their direct right of action, existing creditors might well be heard to complain. As to this, and as to the validity and effect of the proceedings directed to be had for the ascertainment of the sum required to be collected from the stockholders, the court expressed no opinion, as no such proceedings had been taken, and therefore no foundation had been laid for the action.

The vested right of existing creditors to a direct remedy by action against an individual stockholder, when that remedy was in force at the time when the debt was contracted is recognized in many decisions.

Western National Bank v. Reckless, 96 Fed. 70, arose under the Kansas law as it was before the amendment of 1899, under consideration in *Evans v. Nellis*. The legislature of New Jersey had passed an act in 1897, providing that no action or proceeding should be maintained at law in the courts of that state to enforce the statutory liability of any stockholder created by the laws of any other state, and that such liability should

be enforced, only by suit in equity to which the corporation, all creditors, and all stockholders must be parties. Thus the same question was raised which was presented by the change of remedy in Kansas, itself. And it was held that the deprivation of the direct remedy of the stockholder was an impairment of the obligation of his contract.

And, upon the same principle, in *Hawthorne v. Calef*, 2 Wall., 10, where a charter granted by the legislature of Maine provided that the individual property of stockholders should be liable, and might be taken in execution upon a judgment against the corporation, it was held that a subsequent act which repealed this provision impaired the obligation of the contract between existing creditors and stockholders, and between existing creditors and the corporation, because it took away from *the creditors* an existing right.

But the change of remedy by the Minnesota Act of 1899, deprived the creditor of no such personal direct right of action against the stockholder, because no such right then existed under the laws of that state. It merely and simply expanded the remedy to meet the defects of the remedy as it then existed.

In *Commonwealth v. Cochituate Bank*, 3 Allen (Mass.) 42, the change of remedy was from a suit in equity by one or more of the creditors, against the stockholders, to an assessment upon stockholders, by receivers, under the direction or approval of the court. It was there said: "It will at once be perceived that no objection to a change of remedy can be successfully urged, on account of its being more speedy and effectual. That objection might be urged as to all changes in the forms of proceeding, or the organization of the legal tribunals to act thereon. Every statute extending the equity powers of this court would be obnoxious to objections of this character. The objection, to be tenable, must go beyond this, and show that the statute increased the actual liabilities of the stockholders, and was something more than a change in the mode of enforcing a pre-existing

liability. * * * The proceedings under the late statute may require the action of the court upon an estimated value of such assets, rather than an absolute ascertainment of the amount; but the principle to be applied is the same, varying only in the mode of arriving at the result as to the deficiency chargeable upon the stockholders."

Walker v. Crain, 17 Barb. 119 was an action brought by an individual creditor of a corporation against a single stockholder. The creditor had a right to this remedy of an action at law at the time when the debt was incurred. Subsequently the legislature passed an act (April 16, 1852) providing for the appointment of trustees in case of corporate insolvency, and directing the trustees to dispose of the corporate property, to assess deficiencies upon stockholders to the extent of their liability and collect the same, and to make distribution of any surplus among the stockholders. It was held that this act barred the individual action, just as a court of equity might do by injunction, to prevent preference and secure equality of distribution; that the direction to the trustees necessarily vested in them the title to the stockholders' liabilities; that the act was constitutional as the stockholder's obligation was not to pay one creditor to the exclusion of others, or to pay one creditor absolutely but to devote a "particular fund" an amount equal to the par value of the stock to the payment of all debts; and that the stockholder's obligation was not a contract with the corporation but rather a duty.

Equally in point is the language of this court in *Hill v. Merchants Ins. Co.*, 134 U. S. 515, 526, where the statute under consideration gave a direct remedy against an individual stockholder, when previously he could only be sued in common with other stockholders in a suit to enforce contribution. "His undertaking was to pay each and all of the notes on demand, and it was entirely competent for the legislature, as a regulation of the business and affairs of the company, to give its creditors a new or additional remedy by which this undertaking could be enforced in their behalf—such

remedy not increasing the debtor's liability. As said by this court in *Chicago Life Ins. Co. v. Needles*, 113 U. S. 574, 580, the condition is implied in every grant of corporate existence that 'the corporation shall be subject to such reasonable regulations, in respect to the general conduct of its affairs, as the legislature may from time to time prescribe, which do not materially interfere with or obstruct the substantial enjoyment of the privileges the state has granted, and serve only to secure the ends for which the corporation was created.' * * * His liability to pay that amount has no such connection with the liability of other stockholders as to exempt him from a suit at law to compel him to pay the sum he agreed to pay. *Hatch v. Dana*, 101 U. S. 205. The statute restricts any judgment against him to the amount he originally assumed to pay. Consequently, no substantial right of his has been violated. 'Whatever belongs merely to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of the contract.' "

Story v. Furman, 25 N. Y. 214, presented the question of the validity of the New York Statute of 1852 in its effect upon the liabilities of stockholders under a statute of 1811, and is thus stated in the opinion: "The objections to this act under this head are, first, that it takes from the creditor the cause of action against the stockholders which the statute of 1811 gave him, and transfers it to a trustee under different circumstances from those under which the court of chancery would previously have interfered with his enforcing it." In discussing this question the court said: "The obligation of the contract consists in the agreement or duty of the stockholder under this act to pay to the creditors of the corporation upon its dissolution an amount sufficient to pay its debts to the extent of the respective shares of each stockholder in the said company. This is the contract of the stockholders, and this is its obligation. This statute does not in any way take away or release or discharge their liability. It in no way acts upon the contract itself.

It does not profess or propose to do so. On the contrary it clearly recognizes the binding force of the statute liability. It treats it as a subsisting and valid obligation. But it is claimed that it impairs the face of the obligation by acting upon the remedy. * * * Chief Justice TANEY, in *Remsen v. Kenzie* (1 How. U. S., 316) states the rule as follows: 'Whatever belongs merely to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of the contract, although a new remedy may be deemed less convenient than the old, and may in some degree render the recovery of debts more tardy and difficult, yet it will not follow that the law is unconstitutional.' This quotation, it seems to me, answers all the objections to the act of 1852, so far as they related to the remedy."

II. It has never been held that the debtor or party under obligation to pay by reason of his contract has any vested right to be pursued through one form of remedy rather than another. His obligation is to pay what he has undertaken to pay; neither more nor less than this.

In the present case the stockholders' contract is that they will be liable, in the terms of the constitution. They agree to assume the liability to that extent. That is the obligation of their contract. No change in the law which does not make them liable to any greater extent can be said to impair the obligation of their contract.

Now the objection to the validity of the Act of 1899 as impairing the obligation of the contract of the stockholders amounts substantially to this: That while they had contracted to be liable in the terms of the constitution, the Legislature of Minnesota, at the time when their obligation was incurred, had provided a remedy so ineffectual that so long as they absented themselves from that state they were immune; that it was an essential element of their contract that they would be liable, that they should be pur-

sued only by a remedy which was incapable of enforcement; that thus, in effect, it was a part of their contract to be liable that their liability should never be enforced; that, therefore, their contract to be liable was in fact a nullity; and that, accordingly, the creation of a remedy which could be enforced was the creation of a liability which did not previously exist.

The defendants' proposition is, thus, that it was perfectly competent for the legislature to provide a remedy which was ineffectual to enforce the obligation he entered into, and so could not reach them, and that, having done so, the legislature was precluded from further action; and that it was wholly incompetent for the legislature, on discovering the insufficiency of the existing remedy, to provide one which could reach them.

This argument has no support in either reason or authority. If it needs any refutation, that will be found in the decisions of this court, here cited.

Bronson v. Kinzie, 1 How. 315. "Undoubtedly a state may regulate at pleasure the modes of proceeding in its courts in relation to past contracts as well as future. * * * Whatever belongs merely to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of the contract."

Terry v. Anderson, 95 U. S. 663. "It is difficult to see why, if the legislature may prescribe a limitation where none existed before, it may not change one which has already been established. The parties to a contract have no more a vested interest in a particular limitation which has been fixed than they have in an unrestricted right to sue. They have no more a vested interest in the time for the commencement of an action than they have in the form of the action to be commenced; and as to the forms of action or modes of remedy, it is well settled that the legislature may change them at its discretion, provided adequate means of enforcing the right remains."

Campbell v. Holt, 115 U. S. 627. "There are numerous cases where a contract, incapable of enforcement for want of a remedy, or because there is some obstruction to the remedy, can be so aided by legislation as to become the proper ground of a valid action. * * * In all this class of cases the ground taken is that there exists a contract, but, by reason of no remedy having been provided for its enforcement, or the remedy ordinarily applicable to that class having for reasons of public policy been forbidden or withheld, the legislature, by providing a remedy where none exists, or removing the statutory obstruction to the use of the remedy, enables the party to enforce the contract otherwise unobjectionable." This language was used with especial reference to the repeal of a statute of limitations by which, prior to that repeal, a debt had become barred. It was held that the debt still existed; that the bar of the statute was not a vested right; and that it was competent for the legislature to remove the bar by repealing the statute. As was said at page 628: "The right does not enter into or become part of the contract. No man promises to pay money with any view to being released from that obligation by the lapse of time."

City & Lake R. R. Co. v. New Orleans, 157 U. S. 224. "Modes of procedure in the courts of a state are so far within its control, that a particular remedy existing at the time of the making of a contract may be abrogated altogether, without impairing the obligation of the contract, if another and equally adequate remedy for the enforcement of that obligation remains, or is substituted for the one taken away." This, it is true, is said more directly of the rights of the creditor; but that it is equally true as regards the debtor is made clear by the further language: "One who engages by contract to do a certain thing cannot claim that the obligation he has assumed is impaired by legislation that is *designed only to enforce* performance of his obligation."

Oshkosh Water Works Co. v. Oshkosh, 187 U. S. 439. "It is well settled that while, in a general sense, the

laws in force at the time a contract is made enter into its obligation, parties have no vested right in the particular remedies or modes of proceeding then existing.

Waggoner v. Flack, 188 U. S. 604. "We cannot see any difference in principle between a case where an act was in existence when a contract was made, providing a certain remedy for a violation of the contract, and then after the contract is entered into, the legislature passes another act, giving an altogether different remedy, * * * and a case where an act which denied the remedy of forfeiture when the contract was made, was repealed by a subsequent enactment which provided a forfeiture as a remedy. In *both* cases there is a plain alteration of remedy, while in *neither* is there any contract springing from the passage of the first act that no other remedy *more effective* should be given as against one who purchased land during the existence of the statute."

As is said by Judge COOLEY, Constitutional Limitations, 356, "It is also equally true that where a legal impediment exists to the enforcement of a contract which parties have entered into, the constitutional provision in question will not preclude the legislature from removing such impediment and validating the contract. A statute of that description would not impair the obligation of contracts, but would enforce and preserve it."

The precise question was raised in *Straw & Ellsworth Co. vs. Kilbourne Co.*, 80 Minn. 125, where it was held that *this* Act of 1899 did not violate any provision of the Constitution of Minnesota or of the Constitution of the United States; that there was no taking of property without due process of law; that the statute did not enlarge the liability, but merely provided a remedy; and that there was no vested right in any particular remedy. "No substantial right is affected by the law in question, for in no manner does it increase the liability of the stockholder."

III. If it be admitted that the stockholders had incurred any liability in becoming members of the corporation, then the Act of 1899 was really beneficial to them.

So long as personal liability exists, it is manifestly in the interest of justice, of justice to the stockholder especially, that it should be made effectual by distributing the burden among the several stockholders, wherever they may in fact reside. A direct liability of each stockholder to any creditor has been found to be productive of a great deal of hardship. In such case the creditors naturally seek out the stockholder of largest holdings and largest means, or the stockholder who by reason of his place of residence is most readily exposed to their attack, and pursue their remedies against him until they have exhausted the amount of his liability. And if the stockholder thus attacked is compelled to pay more than his equitable proportion of the debts, he is then compelled to pursue such of his fellow stockholders as he can find in order to enforce contribution by a new and expensive course of litigation, with all its risks and uncertainties.

The scheme of the Minnesota statutes, as brought to completion by the Act of 1899, is devised to secure an equitable and exact distribution of the burden of individual liability. Under it each stockholder is exposed to but a single suit, by a single representative of all the rights of the creditors, and is called upon only for the amount of his proportional share of the total liability, as nearly as may be determined. And he need be exposed to no suit whatever, if he recognizes his liability, and voluntarily discharges his obligation.

The purposes and frame of this scheme are ideal in their equity. And it is obviously essential to its successful working out that the amount of the collective burden, and each stockholder's proportion of that burden, should be judicially ascertained at the outset, once for all. It is equally obvious that the proper tribunal for such judicial ascertainment is a court of the state which has created the corporation, has imposed the

liability, and has provided the machinery for its enforcement. And it is equally obvious that the legislature of that state could neither confer the power, nor impose the duty, upon courts of other states to employ such machinery or methods as it has devised for working out these equitable results in its own courts for ascertaining as nearly as may be the extent to which the individual liability will need to be enforced.

This system, thus devised and made operative by the legislature of Minnesota, is distinctly a protection to the stockholder and a *limitation* of his liability. It is an equitable distribution of the burden, in advance, prior to any demand upon him for payment or contribution. And his more complete protection is ensured by the provision that if the collection of the assessment thus made shall realize more than the amount required to meet the obligations, the surplus shall be distributed *pro rata* among those who shall have contributed to the fund.

IV. The perfection of the remedy is to the advantage of the creditors, and does not impair the obligation of the contract as regards them.

Beginning with the decision in *Allen v. Walsh*, 25 Minn., 543, and up to the passage of the act of 1899, it was uniformly held that the liability of stockholders was to all the creditors in common, and that no creditor had the right to sue a stockholder at law, and recover the whole of his claim, while other creditors received nothing.

The cases, therefore, which hold that the creditor cannot be deprived, by change in the remedy, of his direct action at law against an individual stockholder, where that right existed when the debt was incurred, have no application.

As was pointed out in *Arthur v. Willius*, 44 Minn., 409, "An action against a corporation under Gen. Stat. 1878, c. 76 [reenacted as Chapter 76, Gen. Stat. of 1894] is in the nature of an action to wind up its affairs, to collect and convert all its assets, and appropriate them

ratably among creditors, and to enforce the individual liability of stockholders and others to the extent of the deficiency of assets. As was said in *Merchants Nat. Bank v. Bailey Mfg. Co.*, 34 Minn., 323, 'it is an action not proceeding in the ordinary way of actions at law by trial of simple issues, judgments and execution, but by the exercise of powers peculiar to the former courts of chancery.' "

Thus under the former act, as under the present law the sequestration proceedings were begun by one or more creditors, but enured to the benefit of all. Stockholders who might be found in Minnesota could be brought into the proceeding and compelled to contribute to make good the deficiency of assets, up to the amount of his individual liability. But stockholders who could not be found in Minnesota could not be reached at all, as was finally held by this court in *Hale v. Allison (supra)*.

It is difficult to see what substantial right the *creditor* is deprived of by an amendment of the law which makes the individual liabilities assets, and vests the title to them in the receiver, and authorizes him to enforce these either within or without the State of Minnesota. He loses the doubtful privilege of making himself trustee, at his own primary cost and risk, to bring in resident stockholders and to establish their liabilities whenever disputed. He gains the advantage of having that done through an officer of the court and under the responsibility of the court's direction, and at the direct expense of the assets; and he gains the further advantage of making available and enforcing the liabilities of non-resident stockholders who previously were practically immune.

It would be strange, indeed, if the *stockholders*, who by this change in the law have been stripped of their immunity, and have been for the first time put in the position where their agreed liability can be enforced, could urge, against that enforcement, the argument that the change was in derogation of the constitutional rights of the creditors; and this, while the creditors have proved their debts and accepted the benefit of

the change in the law, and see nothing in it but benefit to themselves.

It would be strange, indeed, if the stockholder when sued could say: "This action which is brought against us in the interest of the creditors, and to secure the payment of their debts, cannot be maintained because it is not so advantageous to the creditors as the remedy which it superseded,—and that remedy could not touch us at all."

POINT FOURTH. The assessment made by the Minnesota court under the Minnesota statute is conclusive upon the stockholders.

I. This would seem to follow as a necessary corollary from the propositions which are deemed to be already established.

If the members of the Minnesota Thresher Manufacturing Company in accepting incorporation at the hands of the legislature of Minnesota submitted themselves to the jurisdiction of that state in respect of all matters touching their rights and liabilities as members of the corporation to the jurisdiction of that state, and admitted themselves to be, and consented to be regarded as citizens of that state, *pro hac vice;* and if The legislature of that state, in providing a more perfect and effectual remedy for the enforcement of the liabilities which they voluntarily thus assumed, did not impair the obligation of their contract, or, in other words, did not increase that obligation beyond the terms of their contract, then it follows that the assessment levied upon them in conformity with the requirements of that legislation must be binding upon them.

This is not a new question. It has repeatedly arisen in the administration of the affairs of insolvent corporations.

The orderly and just administration in such cases

requires that some one court should conduct and control the proper and necessary proceedings for the adjustment, enforcement, and protection of the rights of all parties interested. To this end the machinery of a court of equity is indispensible. And to such court must be confided the duty of ascertaining the debts and obligations, of getting in the assets and resources available for their payment, and of directing the proper distribution.

It would be unseemly and intolerable if the parties interested could be subjected to the varied procedure and possibly inconsistent holdings of the different local tribunals where the different stockholders might be found, upon identical questions.

With a thousand stockholders liable, residing in a dozen different states, if each of were entitled to have tried, in his own jurisdiction, not only the question of his individual liability, as dependent on the fact of his membership in the corporation—which he may always dispute—but also the questions of the amount of the corporate debts and obligations, of the pecuniary responsibility of his fellow stockholders, of the extent of their liabilities, and of the proper and legitimate expenses of the administration, the realization of a fund adequate to meet the obligations could not be hoped within the average lifetime of the creditors, or stockholders, if ever.

It should be clearly recognized and constantly borne in mind that the levying of the assessment is not in itself a judgment against the individual stockholders. The ascertainment of the claims proved by creditors is in legal effect equivalent to so many judgments in favor of the creditors, against the corporation. Even here the stockholders have the right to intervene and to be heard upon the validity of the claims presented. If they choose to rely instead upon any supposed immunity from the enforcement of such claims as may be allowed, when attempted to be enforced against their individual liability, they do so at their own option, and at their own peril.

The ascertainment of the amount of corporate lia-

bilities and of the exhaustion of ordinary corporate assets relates purely to matters in which the corporation represents the stockholders and acts by their authority as their agent. The exhaustion of ordinary assets is sufficiently established, under a rule of universal application, by the return of an unsatisfied execution. The necessity for resort to individual liability being established, the determination of the extent to which that liability must be enforced is necessarily confided to the judicial discretion of the court having jurisdiction of the winding up of the affairs of the insolvent corporation.

This point being reached, there are but two alternatives. Either the full amount of the stockholders's liabilities must be enforced and collected, or some lesser amount, which the court in the exercise of its judicial discretion considers will realize the fund required to meet the corporate obligations. In either case the assessment is not a finality; for the contributing stockholders will be entitled to receive back their *pro rata* shares of any surplus remaining after the corporate obligations shall have been satisfied.

Thus the provision of the statute which authorizes the court to limit the amount of the assessment to such proportion of the individual liability as in its judgment will suffice for the purposes of the assessment is a distinct benefit and protection to the stockholders, and one of which they cannot be heard to complain.

If, then, the stockholder chooses to refrain from participating in the proceedings in which are determined the amount of corporate obligations, the exhaustion of ordinary assets, and the extent to which it is necessary to resort to individual liabilities, in all of which matters he is primarily represented by the corporation, he has still, when sued by the receiver for the amount of his assessment, his day in court upon any defenses which belong to him individually.

In *Great Western Telegraph Co. v. Purdy*, 162 U. S., 329, 336, this court held that an assessment for amounts collectible of stockholders under their contract in

becoming members of a corporation "was doubtless, unless directly attacked and set aside by appropriate judicial proceedings, conclusive evidence of the necessity for making such an assessment, and *to that extent* bound every stockholder, without personal notice to him." "But," the court adds, "the order *was not*, and did not purport to be, *a judgment against any one.* It did not undertake to determine the question whether any particular stockholder was or was not liable in any amount."

It is thus clear that the objection that the order is a judgment against the stockholder, without giving him his day in court, is not tenable.

The propriety and necessity of the proceedings to obtain such assessment are equally obvious. In the kindred case of stockholders in national banks it was fully recognized in *Kennedy v. Gibson*, 8 Wall. 498, 505, where it was said: "It would be attended with injurious consequences to forbid action against the stockholders until the precise amount necessary to be collected shall be formally ascertained. This would greatly protract the final settlement, and might be attended with large losses by insolvency and otherwise in the intervening time. The amount must depend in part upon the solvency of the debtors and the validity of the claims. Time will be consumed in the application of these tests, and the results in many cases cannot be foreseen. The same remarks apply to the enforced collections from the stockholders."

Converse v. Stewart was an action in the New York Supreme Court by the same receiver who is plaintiff in the present action against another stockholder in the same Minnesota Thresher Manufacturing Company. Hon. WILLIAM G. CHOATE, the referee before whom that case was tried, said in his decision: "The courts of the home state must certainly be competent to entertain jurisdiction if the legislature of the state sees fit to confer it on them, of any proper remedial proceedings for the winding up of an insolvent corporation, the ascertainment of its debts, the applica-

tion of it assets to the payment of its debts and the determination of the amount which the stockholders should contribute towards the deficit in cases where by the law under which they became stockholders they impliedly contracted to pay, such contributions being in effect assets to which creditors can resort."

The conclusiveness of the assessment thus made, as to its necessity and amount, is affirmed in *Great Western Telegraph Co. v. Purdy (supra)* and in many other cases.

The decision in *Straw & Ellsworth Co. v. Kilbourne Co.*, 80 Minn., 125, 136,—under the act of 1899—is directly to the point. "The order of assessment is, under section 5, conclusive upon all the stockholders, so far as it decides the amount of assets and liabilities of the corporation before the court, and is conclusive as to the necessity of making an assessment to the extent and in the manner ordered. All the cases last cited sustain the proposition that as a member of the insolvent corporation, the shareholder is bound by the decision of the court of the state where it was organized, made in administering on its affairs in an insolvency proceeding and when determining the amount of its assets and liabilities and the amount of an assessment to be made upon the stockholders, and that collection of the amount can be enforced wherever such stockholder is found." This decision points out the similarity between the assessment thus authorized and that authorized in the case of an insolvent national bank, the difference being that "under the latter the assessment is made by the comptroller of currency, while here the assessment is made by the court in insolvency proceedings."

In *Howarth v. Lombard*, 175 Mass. 570, 575, (already cited) it is said of the liability of the stockholders of a Washington corporation: "Inasmuch as the nature of it and the method of enforcing it depend upon the statute which enters into the implied contract, we must look to the statute to ascertain its extent and the manner of enforcing it. If it is of such

a nature as to call for local proceedings in the state where the corporation is, *in order to adjust equities*, such proceedings *must be had*, and it cannot be made effectual without them. Most of the cases in which creditors of foreign corporations have been refused relief in this commonwealth have shown rights which, under the statutes creating them, could not properly be enforced without proceedings in the foreign state whereby equities could be adjusted. In the present case, as the statute has been construed, it is plain that no action can be maintained against a stockholder *until after* proceedings in a court of Washington, showing the insolvency of the corporation and the need of payment to satisfy the claims of creditors. After such proceedings, and an adjustment of the rights and liabilities of the corporation, of creditors, *and of stockholders*, collection can be made from stockholders wherever they are found."

In this same decision in *Howarth v. Lombard* the court goes on to add (pp. 576–578): "Under the statute the stockholders impliedly agreed that if their subscriptions were in part unpaid when they were needed for creditors, they would pay the balance to the corporation or its legal representative, *and that if they were needed* they would also pay their proper share, up to the amount of their subscriptions, to the trustees of *this additional fund*, for the benefit of creditors. The determination of the questions involved are a part of the proceedings of the court in the administration of the affairs of a local insolvent company. The court of Washington, acting under its general authority in such administration, *is the only tribunal* which has jurisdiction to determine the amounts due creditors and to collect and apply the assets of the corporation. The undertaking of the stockholders relates directly to the payment of amounts so to be ascertained. The ascertainment is like a common case of a judgment against a corporation which is binding on stockholders. The members of such corporations, as well as the corporations themselves, *are within the jurisdiction* of the local court so

far as is necessary for the determination of the rights and liabilities of the corporation, and its members among themselves. In reference to this kind of liability such decisions and orders are binding on stockholders who are not before the court otherwise than by virtue of their membership in the corporation."

A similar question was presented in *Upton, assignee, v. Hansbrough*, 3 Biss. 417, 426, where, upon objection to an assessment made by the court upon the stockholders of a bankrupt corporation, that the order was made without notice to the stockholders, the court said: "I think the stockholders, who are the integral parts of the corporation, may be considered as *quasi* parties to the bankruptcy proceedings to such extent as to be bound by the order without notice. If they were dissatisfied with the order, they, by their relation to the bankrupt corporation, had such a standing in the bankrupt court as enabled them to move in that court to set aside the order, if improvidently made, or to apply for a review in the Circuit Court under section two of the bankrupt act. Having omitted their plain rights in that respect they are concluded by the order in these suits. It was suggested by some of the counsel that the call was for more than was necessary to pay the debts of the company. That question cannot be tried in this case. The order of the district court, it having jurisdiction over that matter, is conclusive. Lord ELDON says in *Ex parte Hewdry*, 15 Vesey 498, 'that a commission in bankruptcy is nothing more than a substitution of the authority of the lord chancellor, enabling him to work out the payment of those creditors who could by legal action or equitable suit have compelled payment.' * * * If the chancellor in such a case could authorize his receiver to make a valid assessment collectible by the receiver at law, I think a court of bankruptcy could do the same."

In re Republic Ins. Co., 3 Biss. 452, holds that the bankrupt court had power to assess stockholders for the amount required for the payment of debts and the expense of closing up the corporate affairs; and that such assessment was the foundation of actions at law

by the assignee to recover the amounts of the assessments from the stockholders.

Under the National Banking Act, stockholders are made individually liable (U. S. Rev. Stat. Sec. 5151), in substantially the same terms as those contained in the Constitution of the State of Washington; and it is provided in the National Banking Act, (U. S. Rev. Stat. Sec. 5234,) that in case of the insolvency of the corporation the Comptroller of the Currency may appoint a receiver, who, under his direction, "may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders."

Thus the same power is conferred upon the comptroller in the case of national banks, as that conferred upon the courts of Washington and of Minnesota in the case of corporations of those states. Like powers and duties are conferred and imposed, in both cases, upon the receivers, when appointed. In the one case the receiver acts under the direction of the comptroller, in the other case under the direction of the court. The function of the Comptroller and of the court are equally judicial, in determining the questions confided to the exercise of their judgment and discretion. The purposes to be accomplished in either case are the same. And in both cases is involved the question of the necessity of calling upon stockholders under their added, or individual liability, as well as under their unpaid subscriptions for stock.

The two obligations of the stockholders arise out of the identical contract assumed by them in becoming members of the corporation. In that contract they severally agree to be liable for the amount of their subscriptions, and for such added amount, within the limits fixed, as may be necessary to discharge the obligations of the corporation. So long as the stockholder is only held liable within the limits of this contract, it is no concern of his through what instrumentality that liability is enforced.

The ascertainment of the preliminary facts, in the case of each branch of this liability, must be made

through the same procedure, and to the same end. In respect of both purposes it is equally essential that it be judicially determined what deficiency of assets exists, what individual liability exists, available for meeting such deficiency, and to what extent it is necessary to resort to individual liability.

There is, therefore, no more ground for asserting the right of the stockholder to be personally brought into court upon the levying of an assessment on one branch of his liability than upon the levying of an assessment on the other branch. Both proceedings equally affect his personal rights. Both must proceed upon the same *data* and in the same manner. In both cases the stockholder requires and is entitled to exactly the same protection. In many cases he may be liable upon both grounds. In the case of his liability for unpaid subscriptions his protection is assumed to be afforded by the sanctity of the judicial action of the tribunal which levies the assessment. He has the same protection in the case of his superadded liability.

In *Kennedy v. Gibson*, 8 Wall. 598, 505, which arose under the National Banking Act, the court said: "It is for the Comptroller to decide when it is necessary to institute proceedings against the stockholders to enforce their personal liability, and whether the whole or a part, and if only a part, *how much shall be collected*. These questions are referred to his judgment and discretion, and *his determination is conclusive*. The stockholders cannot controvert it. It is not to be questioned in the litigation that may ensue. He may make it at such time as he may deem proper, and upon such *data* as shall be satisfactory to him. This action on his part is indispensable whenever the personal liability of the stockholders is sought to be enforced, and *must precede* the institution of suit by the receiver."

This decision was emphatically reaffirmed in *Bushnell v. Leland*, 164 U. S. 684, as long settled, and not open to further discussion. It is therefore needless to cite the numerous intervening decisions to the same effect.

In *Bailey v. Sawyer*, 4 Dillon, 463, it was said, in the case of a stockholder of a national bank that "the comptroller, in the exercise of a *judicial* discretion, decides upon the *data* before him when 'it is necessary' to compel contributions from stockholders to pay the debts of the bank."

The same "judicial discretion" which is confided in the comptroller by the statutes of the United States is confided in the courts of Minnesota and of Washington by the statutes of those states.

In *Hawkins v. Glenn*, 131 U. S. 319, *Glenn v. Liggett*. 135 U. S, 393, and in numerous other cases, it had been decided that in case of an assessment laid by the court upon the stockholders of an insolvent corporation by reason of their liability upon stock held by them which had not been paid in full, the order or decree of the court levying the assessment could be made without the presence of the stockholders and without service of notice or process upon them. *In Hawkins v. Glenn* it was said: "A stockholder is so far an integral part of the corporation that, in view of the law, he is a privy to the proceedings touching the body of which he is a member," citing its own language in *Sanger v. Upton*, 91 U. S 56: "It is not necessary that the stockholders should be before the court when it [the order] was made, any more than that they should have been there when the decree of bankruptcy was pronounced. The decree gave the jurisdiction and authority to make the order." It was added: "As against creditors, there is no difference between unpaid stock 'and any other assets which may form part of the property and effects of the corporation.'"

And in *Hancock Nationvl Bank v. Farnum*, 176 U. S. 640, 643, it was said: "This representative character of the corporation has been affirmed by this court several times. In *Hawkins v. Glenn*, 131 U. S. 319, it was held that 'in the absence of fraud, stockholders are bound by a decree against their corporation in respect to corporate matters, and such a decree is not open to collateral attack.' This was a case in which an

assessment ordered by a court which had jurisdiction of the corporation was held *binding* upon stockholders residing in another state."

In *Howarth v. Lombard (supra)* the Supreme Court of Massachusetts said: "That such adjudications are binding upon absent stockholders in reference to assessments for unpaid subscriptions has often been expressly decided. * * * Under the statute now before us [of Washington] we can see no difference in principle between the secondary and primary liability. * * * in reference to each the subscriber for stock contemplates the *same* kind of proceedings, and a collection by the same officer, who represents not only such assets as the corporation has for all purposes, but the right to a special fund, which is an asset, that can be collected and used for creditors only." The secondary fund thus referred to was the individual liability of stockholders, beyond the amounts due from them for balances unpaid on their subscriptions; and it was held that the assessments were equally binding upon the stockholders in both cases, and upon the same principle.

Similarly, in *Howarth v. Angle (supra)* the New York Court of Appeals said: "There is *no* substantial difference between the liability for an unpaid balance on a stock subscription, which is an express contract to take stock and pay for it, and the liability for the unpaid deficiency of assets assumed by the act of becoming a member of the corporation through the purchase of stock, from which a contract is implied to perform the statutory conditions upon which stocks may be owned."

II. It is no objection to the assessment that the expense of realizing and administering the fund is taken into account and provided for.

The purpose of imposing an individual liability upon stockholders is the payment of the corporate obligations, in full. To carry out that purpose it is essential that the stockholders should either voluntarily or under

compulsion contribute an amount sufficient to make such payment, over and above the expense of collecting and administering the fund. Otherwise the purpose will be defeated, for the fund will not realize itself. That must be accomplished through human agency and labor, which must be paid for.

If the stockholders recognize their legal obligation, and pay without contest, then the expense of actions for collection is eliminated. If they choose to defend and thus to put the receiver to the expense of litigation, they have only themselves to blame for the added cost. And where they have united, as here, in a common liability, those who, by contesting the right of the receiver, add the cost of litigation to the cost of administration, as do the defendants in these actions, have no ground of complaint on that score.

The Minnesota constitution does not limit the liability to corporate debts, strictly so called. The language is broad and general. "Each stockholder in any corporation *shall be liable* to the amount of stock held or owned by him." The section is entitled, "Liabilities of stockholders." This is the only declaration, definition, and limitation of these liabilities. There is no limitation as to the character of the liabilities, but only as to the amount. And the use of the plural form "liabilities," is significant.

The only reasonable interpretation of this language is that the liabilities declared and imposed are co-extensive and co-terminous with the obligations of the corporation, and of the obligations of the corporate assets, of which they form a part.

As the stockholders' liabilities constitute a fund for the payment of creditors after the ordinary assets are exhausted, being, in the language of *Howarth v. Angle (supra)*, "a substitute, required by statute, for the personal liability of a partner at common law," and, in the language of *Howarth v. Lombard (supra)*, "this additional fund, for the benefit of creditors," the aggregrate amount of the fund must be such as to be adequate to that purpose, within the limits of the individual liabilities as fixed by the constitution. As

was said in *Trustees v. Greenough*, 105 U. S., 527, 532, "It is a general principle that a trust estate must bear the expenses of its administration." And the same rule was applied in *Helm v. Smith-Fee Co.*, 79 Minn., 297.

So long as the trust estate is adequate to the expenses of its administration as well as to the payment of ordinary corporate obligations, those expenses should not be suffered to diminish the amounts payable, and justly due, to the creditors.

It should not be forgotten that this fund is not simply the amount of the assessment laid, but is the sum total of the individual liabilities; and the purpose of levying the assessment is to obviate the necessity of actually getting in any greater part of the fund than appears requisite to meet the proper demands upon it.

There can be no question that the expense of a receivership, of the getting in of the assets, and of the administration and distribution of the fund realized, is a proper charge upon the assets of an insolvent corporation. In every scheme for winding up an insolvent corporation such expense is a necessary and essential element to be reckoned with, whether it be in bankruptcy, or under a state system of insolvency, or through the general powers of a court of equity. And it is well known that the courts frequently go so far as to authorize receivers to issue certificates to raise money for such expenses, making such certificates a first lien on the assets.

Clevenger v. Moore, 12 Am. Bank. Rep. 738 was a suit at law brought by a trustee in bankruptcy against a stockholder of a bankrupt corporation to recover the whole amount unpaid on his stock, under the order of the Untted States District Court, directing an assessment of that amount. It was held that the propriety or validity of that assessment could not be questioned collaterally; and that where such assessment has been made by a court having jurisdiction "an action at law may be brought against a stockholder to collect his

quota." Clearly the expense of the recovery and of the administration of the estate of the bankrupt was a proper charge upon the fund so realized.

In *Cumberland Lumber Co. v. Clinton Hill Co.*, 57 N. J. Eq. 627, where the affairs of an insolvent corporation were in course of administration by the Court of Chuncery, it was held that stockholders were liable for "so much of what is unpaid on the stock as will satisfy the claims of corporate creditors, *and meet the expenses of winding up its affairs*;" and that when an assessment has been ordered by the court to meet such corporate liabilities, and an action is brought thereon against a stockholder, "he cannot there question the validity of the assessment."

In *Harper v. Carroll*, 66 Minn. 508, this very question was raised, and the court answered it as follows: "Some of the appellants contend that while the creditors are entitled to recover the amount of their claims, with interest and statutory costs and disbursements, from the stockholders, the latter cannot be required to pay any additional amount of costs and expenses. We cannot so hold. The statute provides for the appointment of a receiver, and this implies that his expenses may be recovered in addition to the above amounts, not exceeding the amount of the statutory liability of of the stockholders."

In *Converse v. Stewart*, above referred to, Judge CHOATE said: "I think it may also be very fairly contended that these expenses attending the proceedings against a corporation and its stockholders for the liquidation of its affairs, are in the nature of costs, and primarily an obligation of the corporation itself, for which the stockholder is bound under the constitution. The appointment of a receiver for the purpose of liquidating the affairs of an insolvent corporation is a common and proper mode of accomplishing that end, and, ordinarily, the fees and expenses of the receiver are paid out of the assets of the insolvent estate; and the court appointing the receiver is the proper court, indeed, properly the only tribunal to pass on the question of the receiver's fees and expenses. Thus these

expenses are a mere incident of the receivership and of the remedy prescribed by the legislature of Minnesota."

And in *Richmond v. Irons*, 121 U. S. 27, 65, the court, referring to an involuntary liquidation of a national bank under the supervision of the Comptroller, said: "The receiver appointed by him is the only person authorized to enforce the liability of the stockholders, as well as to collect and distribute the assets of the bank; everything to be done must be done by and through him, and in his name; he is the only person charged with all the active duties and responsibilities of the liquidation of the bank, including the enforcement of the individual liability of the stockholders. The fund realized for distribution must, *of course*, include the *costs and expenses* incurred by him in the performance of these statutory duties."

These expenses were not in fact in any sense an additional obligation created by the act of 1899 but were a recognized and established part of the stockholders' liability under the remedies which existed before that act was passed.

Frost v. *St. Paul Bank & Invest. Co.*, 57 Minn. 325, was decided in 1894. It is there said: "Newton R. Frost having recovered two judgments against the corporation defendant instituted proceedings against it, under 1878 G. S. ch. 76, Section 9, making these appellants and other stockholders of the corporation codefendants, for the purpose of enforcing their liability for unpaid subscriptions and their statutory liability. Another creditor of the corporation came into the proceeding, proved his claim and such proceedings were had that the court entered a decree establishing the claims of Frost and of the other creditor; appointing a receiver determining the liability of each of twelve stockholders, defendants, including appellants, on unpaid subscriptions and the amount thereof, and the statutory liability of each and the maximum amount thereof; directing the receiver to convert the property, things in action, stock and assets of the corporation, into money, and collect the amount for unpaid sub-

scriptions determined to be due from each stockholder, and out of the proceeds of such sales and collections to pay the costs and disbursements in the action, the *charges of executing the trust*, and to pay said claims and to make report to the court, stating the amount realized and so paid by him. And if, then, there shall remain a part of the claims unpaid, it directs that each stockholder defendant pay upon his statutory liability such proportion of the deficit as his stock bears to the aggregate par value of all the stock of all the stockholders, defendants; and it also provides for a reapportionment of the amount so to be paid, if the share of one or more of the stockholders cannot be collected, by reason of insolvency." The judgment thus set forth in the opinion of the court, was affirmed.

In *First Nat. Bank v. Winona Plow Co.* 58 Minn. 167, it was said: "Neither the constitution nor the statute provides that the stockholder's liability shall be only ratably to the amount of his stock, but 'he shall be liable to the amount of stock held or owned by him'. This is the limitation on his liability, and the court cannot add by construction the additional limitation that he is liable only 'ratably' when some of the stockholders are insolvent or beyond the jurisdiction of the court."

Thus it is clear that the stockholder's *liability* for the expenses of administration was not a creation of the act of 1899, but existed long prior to that time. The act of 1899 merely provided a remedy by which that existing liability could be enforced when the stockholder could not be found within the state.

POINT FIFTH. The stockholder's liability is statutory as well as contractual.

The Constitution of Minnesota, being, as has been shown, self executing, has all the effect of a statute. It differs from an ordinary statute only in the fact that

it is directly enacted by the people of the state, in the direct exercise of their sovereignty, instead of through the interposition of their legislature.

In *Walker v. Crain*, 17 Barb. 119, it was argued in the opinion of the court that the obligation of a stockholder was not a contract with the corporation and was not a contract within the meaning of that word in the constitution. "It appears on the contrary to spring from and to rest upon the enactment of the statute solely. It is a *duty* because the *statute* has enjoined it and not because the parties have entered into a contract to perform it. Judge Story says (1 Mason 243), 'Whatever is enjoined by a statute to be done creates a *duty* on the party which he is bound to perform. When, therefore, a statute declares that a stockholder in a bank shall pay a debt due from a bank under certain circumstances, and those circumstances occur, it creates a direct and immediate obligation to pay it.'"

In *Christopher v. Norveml*, 201 U. S. 216, 228–229, a married woman, resident in Florida, was sued as a stockholder in a national bank for the amount of an assessment ordered by the Comptroller of the Currency. It was set up in her defence that under the laws of Florida a married woman could not bind herself personally by contract, and that therefore the action against her could not be maintained.

This court, in its opinion, after citing several Florida cases upon the inability of a married woman in that state to enter into a contract, said: "But those cases are not in point here; for, in each of them, the personal liability attempted to be imposed upon the married woman arose *entirely* out of contract, express or implied, on her part, and not by force of any statute. * * * Her liability for the debts of the bank is created by the statute, although in a limited sense there is an element of contract in her having become a stockholder; and the right of the receiver to maintain this action depends upon, and has its sanction in, *the statute* creating liability against each stockholder, in whatever way he may have became such. There have been cases in which there appeared such elements of

contract as were deemed sufficient, in particular circumstances, to support an action. *Concord First Nat. Bank v. Hawkins*, 174 U. S. 364, 372; *Whitman v. Oxford Nat. Bank*, 176 U. S. 559, 565, 566; *Matteson v. Dent*, 176 U. S. 521. But that fact does not justify the contention that an action upon an assessment made by the Comptroller is not based upon the statute." Then, citing from *McDonald v. Thompson*, 184 U. S. 71,—"In none of the numerous cases upon the subject in this court is this obligation treated as an express contract, but as one created by the statute and implied from the express contract of the stockholders to take and pay for shares in the association,"—this court added: "All shareholders of stock in national banks become such, subject to the condition, declared by statute, that liability, to the extent of their shares, is imposed upon them for the contracts, debts and engagements of the bank. The statute, in effect, says to all who became owners of national bank stock, no matter in what way they became stockholders, that they cannot enjoy the benefits accruing to shareholders, and escape liability for the contracts, debts and engagements of the bank. In other words, the government that created the bank has prescribed the terms upon which ownership of its shares could be acquired, and individual liability incurred by stockholders."

This is as true of the operation and effect of the Minnesota Constitution as it is when spoken of the operation and effect of the National Banking Act. Individual liability is an original and essential element of the corporate existence; not something extrinsic and superadded by an arbitrary fiat, but a duty inseparable from membership, and a duty which each stockholder necessarily assumes, and voluntarily assumes, in the very act of becoming a stockholder.

And so the stockholder, having accepted the benefit, and having assumed the correlative duty, should be estopped to deny the right of the state to compel full performance of that duty through such means as may be appropriate or may be found necessary to that end.

And nothing short of full performance should be permitted to exonerate the stockholder.

Surely the stockholder cannot be heard to complain that his constitutional rights are invaded by the substitution of an adequate remedy for the enforcement of his duty, in place of a remedy which experience had demonstrated to be wholly insufficient.

POINT SIXTH. The judgments should be affirmed.

WILLIAM G. WILSON,
C. A. SEVERANCE,
Of Counsel.

APPENDIX.

The following is so much of the opinion of the Hon. WILLIAM G. CHOATE in the case of Converse, Receiver, v. Stewart, in the Supreme Court of the State of New York, as considers and discusses the questions involved in the present cases.

Opinion.

* * * * * *

The right of a plaintiff, a receiver appointed for that purpose in another state, to enforce this liabitity in behalf of creditors, under a statute such as that of Minnesota of 1899, cannot, I think, be successfully denied (Howarth v. Angle, 39 App. Div., 155; s. c. 162 N. Y. 179).

The plaintiff in this case is as clearly a *quasi* assignee of the cause of action for the benefit of creditors as was the plaintiff in that case under the laws of Washington.

Moreover the litigation in the Federal Courts in which the Minnesota act of 1899 and the prior act of 1894 have been the subject of inquiry, has reached this result as it seems to me that a receiver duly appointed under the act of 1899 can maintain an action to recover against the stockholder in an action at law in another state (Burget v. Robinson, 113 Fed. Rep. 669; 188 U. S. 739; 123 Fed. Rep. 262; Hale v. Allinson, 188 U. S. 60; 181 U. S. 619; Evans v. Nellis, 187 U. S. 271; Hale v. Hardon, 89 Fed. Rep. 283; same case, 95 Fed. Rep. 747; Hale v. Hilliker, 109 Fed. Rep. 273; Hilliker v. Hale, 117 Fed. Rep. 220; Finney v. Guy, 189 U. S. 335).

These cases show that while under the prior act of 1894, the receiver appointed by the Minnesota Court

was held to be simply an officer of the court and not a *quasi* assignee of the cause of action, the receiver under the Act of 1899 was such a *quasi* assignee and vested with such title to the claim against the stockholder that he could maintain the action to recover the assessment in any jurisdiction.

It is objected further by the defendant that the assessment in this case was laid to cover not only the original debt, but the receiver's expenses incurred and to be incurred and the fees of the receiver and of his counsel in Minnesota and elsewhere, and it is insisted that these expenses are not part of the debt due from the corporation for which the constitution makes the stockholder liable and which the stockholder may have impliedly contracted to pay by his becoming such stockholder and that this being so the Act of 1899 is unconstitutional as impairing the obligation of the contract of the defendant and taking his property without due process of law in violation of the Constitution of the United States and of that of the State of New York. It is further claimed by the defendant that as he was not brought within the jurisdiction of the court at the time of the hearing and proceedings for the determining of the amount of the assessment he is not concluded as to contest the reasonableness and amount properly chargeable for these expenses of the receiver.

The question whether the addition of these expenses under the Act of 1899, impairs or makes more onerous the obligation of the defendant's contract depends, in the first place, upon whether these additional expenses with his share of which he is charged by the proceedings, is an obligation of the corporation for which, whenever afterwards incurred, he became bound under the Constitution of Minnesota by becoming a stockholder, or in the second place if not properly regarded as an obligation of the corporation whether the imposing of these expenses as a part of the scheme for the winding up and liquidation of the affairs of the company was merely a proper part of a remedial system for the enforcement of the debts of the corporation. In either case this

defense must fail. The proceeding, it seems to me, under the Act of of 1899, taken as a whole and including this provision about the appointment of a receiver and providing for the payment of his fees and expenses, is simply a new remedy for the enforcement of the stockholders' liability which it was competent for the legislature of Minnesota at any time to enact.

The same objection was made in the case of Straw & Ellsworth Mfg. Co. v. Kilbourne Boot & Shoe Co., 80 Minn. 125, same case, 83 N. W. Rep. 36; and carefully considered by the Supreme Court of Minnesota and overruled on the ground that the scheme of the Act of 1899 was remedial only, for the purpose of enforcing the constitutional obligation and effected no substantial change in that obligation. This decision was approved by Judge LOWELL in Robinson v. Brown, 126 Fed. Rep. 429.

I think it may also be very fairly contended that these expenses attending the proceedings against a corporation and its stockholders for the liquidation of its affairs are in the nature of costs and primarily an obligation of the corporation itself for which the stockholder is bound under the constitution.

The appointment of a receiver for the purpose of liquidating the affairs of an insolvent corporation is a common and proper mode of accomplishing that end and ordinarily the fees and expenses of the receiver are paid out of the assets of the insolvent estate (See Harper v. Carroll, 66 Minn. 487, s. c. 69 N. W. Rep. 613). And the court appointing the receiver is the proper court, indeed properly the only tribunal to pass on the question of the receiver's fees and expenses. Thus these expenses are a mere incident of the receivership and of the remedy prescribed by the legislature of Minnesota. So also the remedial system adopted by providing for payment of the excess of debt over assets by an equitable assessment on the stockholders is an appropriate and just method for a final winding up of the affairs of the corporation. It is not an unusual remedy and is far more considerate

of the rights and interest of individual stockholders than separate actions at law against them by creditors.

As regards the claimed right of the defendant to contest the propriety of the addition of the expenses—their reasonableness, etc., and the necessity for and proper amount of the assessment—I think the weight of authority is that on questions of this character he, as a stockholder, is bound by the judgment in that respect in the proceeding against the corporation.

The learned counsel for the defendant cites a passage from the opinion of the court in the case of Howarth v. Angle, 162 N. Y. 188, where the court say:

"The stockholders, however, may controvert in our courts all the essential facts, such as insolvency, the amount of the deficiency and the like, whether they are established by the judgment appointing the receiver or not. They may require strict common law proof as to all the facts upon which the deficiency is based, and may contest any unreasonable expenditure in the conversion of assets and the collection of accounts, including extravagant allowances to attorneys or counsel. Upon all these questions the defendant has had his day in the courts of this state, and the united action of the courts below have conclusively determined them against him."

In the view which the Court of Appeals took of the record before them these questions were not open upon the appeal, having been passed upon by the court below and affirmed by the unanimous opinion of the Appellate Division (p. 185). The question therefore to what extent these issues would have been open to contest if not thus conclusively determined as matters of fact against the defendant in the court below was not a point essential to the decision of the Court of Appeals; and with all respect for this dictum of the Court of Appeals, I think the weight of authority is that the stockholder is concluded by the judgment of the court in the proceeding against the corporation; that in such corporate matters he is in fact represented by the corporation and in law bound as a privy. (See Glenn

v. Liggett, 135 U. S. 533, 544; Howarth v. Lombard, 175 Mass. 570; s. c. 56 N. E. Rep. 888, 890, 891, and cases there cited; Childs v. Cleaves, Sup. Ct. of Maine, 50 Atl. Rep. 714).

The courts of the home state of the corporation must certainly be competent to entertain jurisdiction, if the legislature of the state sees fit to confer it upon them, of any proper remedial proceeding for the winding up of an insolvent corporation, the ascertainment of its debts, the application of its assets to the payment of its debts and the determination of the amount which the stockholders should contribute towards the deficit in cases where by the law under which they become stockholders they were made liable and which by becoming stockholders they impliedly contracted to pay, such contributions being in effect assets to which creditors can resort. Such obligations of stockholders are not penal, but contractual in their nature (Whitman vs. Oxford Nat. Bank, 176 U. S. 559). And it has been so held by the Supreme Court of Minnesota (Hanson vs. Davison, 76 N. W. Rep. 254, 255).

The real question here is, what effect are the courts of New York bound to give to the judgment or decree of the court of Minnesota. If the statute of Minnesota is constitutional in that it does not impair the obligation of the contract, and the appointment of a receiver with the usual incidents of such appointment and the laying of an assessment on the stock constitute a proper remedy in such a proceeding, and the judgment pronounced in the proceeding referred to determining the amount of the assessment required for the payment of the debt is, by the law of Minnesota, a conclusive judgment binding upon the stockholders, although they were not personally parties to the proceeding in that state, then the judgment must have the same effect in the State of New York (See Nat. Bank vs. Farnum, 176 U. S. 640).

The statute of Minnesota is explicit that the judgment of the court with regard to the required assessment in this proceeding against the corporation shall bind all stockholders, leaving open to a person sued as

a stockholder elsewhere the question whether he is a stockholder and for how many shares, and whether he has in any way paid the claim in whole or in part or has an offset to the same. Such a proceeding is a proceeding *in rem* or an insolvency proceeding against the corporation in which all its stockholders are as it seems to me, deemed in law present and represented through the corporation, and concluded by the result so far as respects the necessity and amount of the assessment.

The practical effect of holding this question of the amount of assessment open notwithstanding the judgment in the court of Minnesota would be that in any jurisdiction it would be open to any stockholder to contest the reasonableness of the receiver's expenses or fees or the necessity, propriety or amount of the assessment made in that proceeding upon the stockholders for the payment of the debts of the corporation. This would virtually defeat the principal purpose of the Act to have a final liquidation of the affairs of the corporation made in one proceeding. If such liquidation cannot be had in the state where the corporation exists it would seem that it cannot be had anywhere. Certainly the courts of this state in an action against a stockholder would not have before them or within their jurisdiction the necessary parties to determine these questions. The corporation itself would seem to be a necessary party. Virtually the defendant claims the right to have the case in the Minnesota court retried as to its principal issues in this action against him. The defendant's answer also raises no issue as to the reasonableness of the receiver's expenses and there is certainly no evidence of their unreasonableness which would justify the conclusion if the point were open that the foreign judgment is being enforced unjustly against a citizen of this state or that the enforcement violates the public policy of this state (Bank of China v. Morse, 168 N. Y. 458, 481, 482). It would seem that any surplus of the assessment not required for the final liquidation equitably belongs to and could be recovered by the

stockholders contributing it. The liability has been construed to mean not a mere *pro rata* liability in proportion to the shares held, but a liability up to the amount of stock held if in fact required for the security of creditors (Bank v. Plow Co., 58 Minn. 167, 59 N. W. 997). So that it is necessary for the court in determining the amount of assessment to make allowance for the probable inability of some stockholders to respond to the assessment.

* * * * * *

WM. G. CHOATE,
Referee.

Supreme Court of the United States.

Nos. 278 and 279.—October Term, 1906.

Meyer S. Bernheimer and Lorin S. Bernheimer, Surviving Executors of the last will and testament of Simon Bernheimer, deceased, Plaintiffs in Error, 278 *vs.* Theodore R. Converse, Receiver of the Minnesota Thresher Manufacturing Company, Defendant in Error.	In error to the Circuit Court of the United States for the Southern District of New York.
Max Drey, Charles D. Bernheimer and Meyer A. Bernheimer, Executors of the last will and testament of Isaac Bernheimer, deceased, Plaintiffs in Error, 279 *vs.* Theodore R. Converse, Receiver of the Minnesota Thresher Manufacturing Company, Defendant in Error.	

[May 27, 1907.]

These are writs of error to the Circuit Court of the United States for the Southern District of New York.

The actions were brought (January 28, 29, 1904) by Theodore R. Converse as receiver of the Minnesota Thresher Manufacturing Company, a corporation of the State of Minnesota, to enforce an alleged stockholders' liability under the constitution and laws of the State of Minnesota. The court below held the executors of Simon Bernheimer and Isaac Bernheimer, both having died before the suits were brought, liable as such stockholders.

The record discloses that the Minnesota Thresher Manufacturing Company was incorporated under the laws of the State of Minnesota on the 5th of December, 1884, the objects for which the corporation was formed being the purchase of the capital stock, evidences of indebtedness and assets of the Northwestern Manufacturing and Car Company, also a corporation under the laws of the State of Minnesota, and for the further purpose of manufacturing and selling steam engines, farm implements, machinery, etc., and the manufacture and sale of articles, implements and machinery of which wood and iron form the principal parts.

The Northwestern Manufacturing and Car Company was in the hands of a receiver, carrying on its business under the orders of a court, and, on

October 27, 1887, the property and plant of that company, including all its bills receivable, farmers' notes and assets were sold under decree and purchased by the Minnesota Thresher Manufacturing Company. The last-named company continued in business until December, 1900. On December 14 of that year the property and business of the thresher company were placed in the hands of a receiver by the order of the Circuit Court of the United States for the District of Minnesota, in a suit for the foreclosure of a mortgage upon its property, and this receiver carried on the business until the mortgaged property was sold under a decree of foreclosure on May 25, 1901.

On May 6, 1901, the Merchants' National Bank of St. Paul obtained a judgment in the District Court of Ramsey County, Minnesota, against the thresher company, and executions thereon having been returned unsatisfied, the judgment creditor brought suit against the thresher company for the appointment of a receiver and the enforcement of the individual liability of its stockholders in the District Court of Washington County, Minnesota. In that suit Theodore R. Converse, defendant in error in these cases, was appointed receiver. On the petition of the receiver, for the purpose of providing funds for the payment of the expenses of the receivership in the enforcement of the stock liability and payment of indebtedness, an order was made, December 22, 1902, reciting, among other things, that copies of an order of April 16, 1902 (not in the record), had been published, mailed and served as therein required, and that due notice of the hearing had been given to the defendant company and to each stockholder of record as directed by the order, and, on a hearing duly had, an order of assessment of thirty-six per cent of the par value of each share of the capital stock of the thresher company, to wit, eighteen dollars per share, was assessed against each and every share of the capital stock and against each and every person, corporation or party liable as such stockholder, and each such person, corporation or party was directed to pay to the said receiver, at his office in the city of Stillwater, Minnesota, within thirty days after the date of the order, the said sum of eighteen dollars a share; and, further, upon failure to pay said sums, the receiver was authorized to prosecute actions or proceedings against the persons liable in any court having jurisdiction in the State of Minnesota or elsewhere. On appeal to the Supreme Court of the State of Minnesota this order was affirmed. 90 Minn. 144. Subsequently, as stated, these actions were brought and judgment rendered against the executors of the Bernheimers.

Mr. Justice Day delivered the opinion of the Court.

Before entering upon a discussion of the objections urged against the validity of the assessment upon stockholders which is the subject of con-

troversy here, we may say we find no reason to disagree with the judgment of the Supreme Court of Minnesota in holding the Minnesota Thresher Manufacturing Company to be a corporation organized for other than the purpose of carrying on any kind of manufacturing or mechanical business, and therefore not within the exception as to stockholders' liability in favor of corporations of that kind. *State* v. *Minnesota Thresher Man. Co.*, 40 Minn. 215; *Merchants Bank* v. *Minnesota Thresher Man. Co.*, 90 Minn. 144.

The questions made in these cases involve the right to recover upon a stockholder's liability in a Federal court in a State other than the one in which the original proceedings in liquidation were had, and under whose laws the corporation was formed and wherein it carried on business, against stockholders in such corporate companies as the Thresher Company, where the stock had been acquired before the passage of the statute of 1899. General Laws of Minnesota, chap. 272, being "An act to provide for the better enforcenent of the liability of stockholders of corporations."

A former statute had been for some years in force in Minnesota and was the statute law of the State when the stock which concerns the controversy here was acquired by the Bernheimers. This statute was before this court in the cases of *Hale* v. *Allison*, 188 U. S. 56, and *Finney* v. *Guy*, 189 U. S. 335. It was the act of 1894, General Statutes of Minnesota of that year, chap. 76, p. 1595, and is set forth in full in the margin, 188 U. S. p. 60.

Under that act it was held, in a series of decisions in the State of Minnesota, which were reviewed in *Hale* v. *Allison*, that an action could only be maintained under the laws of Minnesota when brought by a creditor or creditors for the benefit of all creditors of the corporation, and the recovery was had for the purpose of making good any deficiency in the corporate assets for the payment of corporate debts; that the receiver could not maintain such an action outside of the jurisdiction of the court appointing him, and that the only remedy was, as stated, in a creditor's action, bringing in all the stockholders, for the realization of a fund to be proportionately distributed among the creditors in one suit.

The principal contentions in these cases are that the act of 1899, above referred to, works such a change in the contract theretofore existing by virtue of the acquisition of stock in a Minnesota corporation as to impair the obligation thereof, and, in ways to be hereafter noticed, undertakes to hold a stockholder by judgment rendered without due process of law.

The act of 1899 was before this court in the case of the *First National Bank* v. *Converse*, 200 U. S. 425, and its principal parts are set forth in the margin of the report of that case on page 428. The act, for our purposes, may be summarized as follows:

"SEC. 1. Whenever any corporation created or existing under the laws of the State of Minnesota, whose stockholders or any of them are liable to it or to its creditors . . . upon or on account of any liability for . . . the stock or shares at any time held or owned by such stockholders, respectively, whether under or by virtue of the Constitution and laws of said State of Minnesota, or any statute of said State or otherwise, has heretofore made or shall hereafter make any assignment for the benefit of its creditors under the insolvency laws of this State; or whenever a receiver for any such corporation has heretofore been or shall hereafter be appointed by any district court of this State, whether under or pursuant to . . . any statute of this State or under the general equity powers and practice of such court, the district court appointing such receiver or having jurisdiction of the matter of said assignment may proceed as in this act provided."

Section 2 provides that upon the petition of the assignee or receiver, or any creditor of the corporation who has filed his claim, the District Court shall appoint a time for hearing not less than thirty days nor more than sixty days from the time of filing said petition, and direct notice of the hearing to be given by publication or otherwise, in the discretion of the court, but if the petition be filed by a creditor, other than the assignee or receiver, the court shall direct notice of the hearing to be personally served on the assignee or receiver.

Section 3 provides that the court shall consider the proofs offered by the assignee or receiver, or by any creditor or stockholder who may appear in person or by attorney, as to the probable indebtedness of the corporation and the expenses of the assignment or receivership and the probable amount of assets available for the payment of such indebtedness and expenses; also as to what parties are or may be liable as stockholders and the nature and extent of such liability. And if it shall appear to the satisfaction of such court that the ordinary assets, or such amount as may be realized therefrom in a reasonable time, will not be sufficient to pay the expenses of such assignment or receivership and the indebtedness, and it is necessary to resort to the liability of stockholders, the court shall, by order, direct and levy a ratable assessment upon all parties liable as stockholders, or upon or on account of any stock or shares of such corporation for such amount as the court in its discretion may deem proper, taking into account the probable solvency or insolvency of stockholders and the probable expenses of collecting the assessment, and shall direct the payment of the amount so assessed to the assignee or receiver within such time as the court may specify in said order.

Section 4 provides for an order to the assignee or receiver to proceed to collect the amount so assessed, unless it be paid within the time specified in the order, and in default of payment the receiver is to bring suit.

Section 5 provides that the assessment levied shall be conclusive upon and against all parties liable upon or on account of any shares of said

stock of such corporation, whether appearing or having notice thereof or not, as to all matters relating to the amount of and the necessity for said assessment, which provision shall also apply to any subsequent assessment levied by order of the court.

Section 6 makes it the duty of the assignee or receiver, upon failure to pay as required by the order, to institute and maintain an action against any party liable upon or on account of any such shares of stock, and that actions may be maintained against each stockholder in Minnesota or in any other State or country, where such stockholder, or any property subject to attachment, garnishment, or other process may be found, and provides that if the assignee or receiver shall believe any such stockholder to be insolvent, or that the expense of prosecuting such action will work to the disadvantage of the estate, he shall not be required to prosecute the same, unless specifically directed so to do by the court.

Section 7 provides for further assessments in case the first proves inadequate.

Section 8 extends the provisions of the act to such subsequent assessments.

Section 9 provides where two or more assessments are levied or directed, the assignee or receiver may join the causes of action against any stockholder on two or more such assessments.

Section 10 provides that if the assignee or receiver fails to institute or prosecute the action, the creditors may petition the court to compel him to proceed, under certain conditions.

Section 11 provides for the return of the surplus, if any remain, in the hands of the assignee or receiver after paying the expenses of the assignment or receivership and the claims of the creditors, and that stockholders who have paid assessments shall, in addition to the remedy provided in the statute, be entitled to enforce contributions from stockholders who have not paid assessments.

Section 12 provides for additional judgments in case of the inadequacy of former assessments.

Section 13 excludes certain stockholders in pending actions from the operation of the act.

This statute came before the Supreme Court of Minnesota in *Straw & Ellsworth Company* v. *Kilbourne Boot & Shoe Manufacturing Company*, 80 Minn. 125. In that case it was given full consideration and its constitutionality sustained, and it was held that while the assessments upon the outstanding shares of stock in an amount necessary to meet the deficiency in the assets of the corporation was conclusive upon the stockholders as members of the corporation, yet the statute, properly construed, did not have the effect to deprive a person, when sued for the amount

assessed on shares of stock under the provisions of the act, from showing that he was not a stockholder, or that he was not the holder of so large an amount of stock as was alleged, or that he had a claim against the corporation which in law or equity he might be enabled to set off as against a claim for assessments, or from making any other defense personal to himself; and that the order of assessment was conclusive upon stockholders only in so far as it decided the amount of assets or liabilities of the insolvent corporation and the necessity of making an assessment upon the stock to the extent and in the amount ordered.

The constitutionality of the act was again affirmed in the same court in the later case of *The London etc. Mortgage Co.* v. *St. Paul Park & Improvement Co.*, 84 Minn. 144.

The stockholders' liability in Minnesota, as in some other States, has its origin in a constitutional provision, and arises under section 3, article X, of the constitution of that State. The language is:

"*Liabilities of stockholders.*

"Each stockholder in any corporation (excepting those organized for the purpose of carrying on any kind of manufacturing or mechanical business) shall be liable to the amount of stock held or owned by him."

The courts of Minnesota have held that a stockholder's liability is, therefore, fixed and measured by the constitution. *Willis* v. *Mabon*, 48 Minn. 140; *McKusick* v. *Seymour, Sabin & Co.*, 48 Minn. 158. It is apparent from a consideration of this constitutional provision that its purpose was to make a stockholder liable to the creditors of the corporation in an amount not exceeding the par value of the stock held by him, and thus secure for the benefit of such creditors, in addition to the assets and property which the corporation might possess, the liability of those who hold its stock in a sum necessary to make good any deficiency between the amount of the assets and the debts within the limitation stated. It is evident from the general language used in this constitutional provision that while a remedy might have been worked out in the courts of equity in the State, it was proper if not necessary that a statute should be passed to make more effectual the liability thus secured by the constitution.

In pursuance of that power the legislature passed the act of 1894, which remained in force until the passage of the act of 1899.

The fundamental contention upon which the argument of the plaintiff in error against the constitutionality of this subsequent act rests is that the statute created a contract into which the stockholder entered upon subscribing to or obtaining his stock, which the legislature had no power to change without running counter to the constitutional requirement invalidating laws impairing the obligation of contracts. Constitution, Art. 1, § 10.

It may be regarded as settled that upon acquiring stock the stockholder incurred an obligation arising from the constitutional provision, contractual in its nature and, as such, capable of being enforced in the courts not only of that State, but of another State and of the United States, *Whitman etc.* v. *Bank*, 176 U. S. 559, although the obligation is not entirely contractual and springs primarily from the law creating the obligation. *Christopher* v. *Norvell*, 201 U. S. 216.

Is there anything in the obligation of this contract which is impaired by subsequent legislation as to the remedy enacting new means of making the liability more effectual? The obligation of this contract binds the stockholder to pay to the creditors of the corporation an amount sufficient to pay the debts of the corporation which its assets will not pay, up to an amount equal to the stock held by each shareholder. That is his contract, and the duty which the statute imposes, and that is his obligation. Any statute which took away the benefit of such contract or obligation would be void as to the creditor, and any attempt to increase the obligation beyond that incurred by the stockholder would fall within the prohibition of the Constitution. But there was nothing in the laws of Minnesota undertaking to make effectual the constitutional provision to which we have referred, preventing the legislature from giving additional remedies to make the obligation of the stockholder effectual, so long as his original undertaking was not enlarged. There is a broad distinction between laws impairing the obligation of contracts and those which simply undertake to give a more efficient remedy to enforce a contract already made.

This principle was stated by Mr. Chief Justice Marshall in *Sturges* v. *Crowninshield*, 4 Wheat. 122, as follows:

"The distinction between the obligation of a contract and a remedy given by the legislature to enforce that obligation exists in the nature of things, and, without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation may direct."

The same rule is recognized in *Hill* v. *Merchants' Ins. Co.*, 134 U. S. 515, wherein a statute was sustained changing the character of the remedy against stockholders in common to one giving a direct remedy against an individual stockholder. The principle was clearly enunciated in *Waggoner* v. *Flack*, 188 U. S. 595–603, in which Mr. Justice Peckham, speaking for the court, said:

"To enact laws providing remedies for a violation of contracts, to alter or enlarge those remedies from time to time as to the legislature may seem appropriate, is an exercise of sovereignty, and it cannot be supposed that the State in a case like this, contracts in a public act of its legislature to

limit its power in the future, even if it could do so, with or without consideration, unless the language of the act is so absolutely plain and unambiguous as to leave no room for doubt that its true meaning amounts to a contract by it to part with its power to increase the effectiveness of existing remedies."

See, also, *Wilson* v. *Standefer*, 184 U. S. 399; *New Orlean City etc. Railroad Co.* v. *New Orleans*, 157 U. S. 219.

The liability arising under the constitution of Minnesota was such that legislation was appropriate to make it effectual. We can find nothing in the fact that one legislature has passed an act which would conclude a subsequent law-making body of equal power from passing new and additional measures to make the remedy more effectual. That the first act did not accomplish its purpose is evident. Under it stockholders in another State, who could not be reached by personal service, were immune from liability and the entire burden was cast upon local stockholders. There was no provision for a receiver or assignee beginning action outside the State, and it was held by this court in *Hale* v. *Allinson*, *supra*, that a chancery receiver was powerless to enforce the rights of creditors beyond the borders of the State. In this condition of affairs the State of Minnesota has undertaken to provide a proceeding for the settlement of insolvent corporations which shall ascertain the assets of the corporation, the extent of the indebtedness of the corporation, the amount to which it is necessary, if at all, to call upon the stockholders' liability. It is obviously an act intended to make effectual the liability which is incurred by stockholders under the constitution of the State, and it ought not to be rendered nugatory unless substantial objection exists against its enforcement. It operates equally upon all stockholders at home and abroad and assesses all by a uniform rule.

We shall proceed to notice some of the specific objections which are urged against the validty of this legislation by stockholders who acquired stock before the act of 1899 went into effect.

It is said that the stockholder is held liable in a proceeding to which he is not a party. Under the prior act he could only be held where service could be had upon him personally, but if we are right in the proposition just announced, that additional remedies may be provided by legislation, then the validity of such additional enactments depends not necessarily upon the personal service upon the stockholder, but upon the fact whether the remedy provided is a well-recognized means of enforcing such obligations and not in violation of constitutional rights. It is true that the stockholder is not necessarily served with process in the action wherein the assessment is made under the act of 1899, but no personal judgment

is rendered against him in that proceeding, and it has reference to a corporation of which he is a member by virtue of his holding stock therein, and the proceeding has for its purpose the liquidation of the affairs of the corporation, the collection and application of its assets and of other liabilities which may be administered for the benefit of creditors. In such case it has been frequently held that the representation which a stockholder has by virtue of his membership in the corporation is all that he is entitled to. It was so held in a well-considered case in Massachusetts, *Howarth* v. *Lombard*, 175 Mass. 570. And it has been held in cases in this court that when an assessment is necessary to be made upon unpaid stock subscriptions for the benefit of creditors, the court may make the assessment without the presence or personal service of stockholders. *Hawkins* v. *Glenn*, 131 U. S. 319; *Great Western Tel. Co.* v. *Purdy*, 162 U. S. 329, 336.

Nor can we see any substantial difference in this respect between a liability to be ascertained for the benefit of creditors upon a stock subscription and the liability for the same purpose which is entailed by becoming a member of a corporation through the purchase of stock whereby a contract is implied in favor of creditors. The object of the enforcement of both liabilities is for the benefit of creditors, and while it is true that one promise is directly to the corporation and the other does not belong to the corporation but is for the benefit of its creditors, either liability may be enforced through a receiver acting for the benefit of creditors under the orders of a court in winding up the corporation in case of its insolvency.

It is sought to distinguish between the Massachusetts case of *Howarth* v. *Lombard*, 175 Mass. *supra*, and kindred cases, and the one at bar, in the fact that when the stock was acquired in that case a statutory provision was already in existence which made the stockholder liable to an assessment in a proceeding in which the stockholder was represented by the corporation. But, as we have said, keeping within the constitutional measure of liability, it was within the power of the legislature of Minnesota to make provisions, within the limits of due process of law, for the liquidation of the affairs of the corporation in a proceeding in the State of its origin, wherein members of the corporation should be sufficiently represented by the presence of the corporation itself. This practice has the sanction of the courts, as we have already shown. It is substantially the procedure authorized by the national banking act, except that the Comptroller of the Currency takes the place of the court, and, without the presence of the stockholders, makes a conclusive assessment. We cannot find any constitutional right belonging to the stockholder which is violated by this change in the character and nature of the remedy against him.

By becoming a member of a Minnesota corporation, and assuming the liability attaching to such membership, he became subject to such regulations as the State might lawfully make to render the liability effectual.

It is further urged that in imposing upon the stockholder the additional expense in a proceeding where the expenses incident to the enforcement of the liability in other States, and against other parties, are taken into consideration and included in the estimate, there is an unwarranted increase in the amount which could be recovered against the stockholder under the former statute. But remembering at all times that the obligation of the shareholder was the creature of the constitution of Minnesota, we think the fact that the additional expenses were included in the assessment cannot operate to defeat it. Such expenses are incident to the ascertainment of the trust fund, which it is necessary to realize from the liability of stockholders, and as long as these expenses are kept within the amount of the original liability no legal right is violated. *League* v. *Texas*, 184 U. S. 156; *Richmond* v. *Irons*, 121 U. S. 27; *King* v. *Pomeroy*, 121 Fed. 287.

It is objected that the receiver cannot bring this action, and *Booth* v. *Clark*, 17 How. 322; *Hale* v. *Allinson*, 188 U. S. 56, and *Great Western Mining Co.* v. *Harris*, 198 U. S. 561, are cited and relied upon. But in each and all of these cases it was held that a chancery receiver, having no other authority than that which would arise from his appointment as such, could not maintain an action in another jurisdiction. In this case the statute confers the right upon the receiver, as a *quasi* assignee, and representative of the creditors, and as such vested with the authority to maintain an action. In such case we think the receiver may sue in a foreign jurisdiction. *Relfe* v. *Rundle*, 103 U. S. 222, 226; *Howarth* v. *Lombard*, 175 Mass. 570; *Howarth* v. *Angle*, 162 N. Y. 179, 182.

It is also contended that the action is barred by the statute of the State of New York, limiting to two years the right to bring an action for a debt of a corporation after the defendant ceased to be a stockholder. We do not think the provision of the statute (§ 55, ch. 588, N. Y. Laws, 1892) relied upon covers these cases. It evidently refers to domestic corporations provided for in reference to the stockholder's liability created by the preceding section of the same chapter. The cause of action did not accrue until the receiver could sue upon the assessment after the stockholder had failed to pay, as required by the order of the Minnesota court of December 22, 1902. *King* v. *Pomeroy*, 121 Fed. 287. Under the New York statute of limitations there was six years in which to bring the action after it accrued, under § 382 of the code, the Minnesota Thresher Manufacturing Company not being a "moneyed corporation or banking association" within § 394. *Platt* v. *Wilmot*, 193 U. S. 603.

The present suits were brought a little more than one year after the causes of action accrued.

Other objections are urged as to the nature of the proceedings in the court of Washington County, Minnesota, in which the original order was made. We have examined them and think none of them go to the jurisdiction and authority of the court, or are such as would invalidate the order of assessment made therein when sued upon in another jurisdiction.

In what we have said we have noticed the principal objections made to the enforcement of the order of the Minnesota court in another jurisdiction, and, finding no error in the judgment of the court below, it is

Affirmed.

Mr. Justice HOLMES:

I regret that the Court has thought it unnecessary to state specifically what contract the stockholder is supposed to have made, as different difficulties beset the different views that might be taken. It seems to me hard to reconcile the construction adopted with that given to the stronger words of § 5151 of the national bank act in *McClaine* v. *Rankin*, 197 U. S. 154, 161. But under the circumstances I shall say no more than that I doubt the result.

True copy.

Test:

Clerk Supreme Court, U. S.